113-73

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 844.

CHARLES E. HESS, PLAINTIFF IN ERROR,

vs.

WILLIAM REYNOLDS, ADMINISTRATOR OF THE ESTATE OF WARREN A. SHERWOOD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED MAY 5, 1884.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles E. Hess and William Reynolds, administrator of the estate of Warren A. Sherwood, deceased, a manifest error hath happened, to the great damage of the said Charles E. Hess, in the order of the said circuit court remanding said case to the circuit court of Jackson county, Michigan, to which order the said plaintiff at the proper time excepted, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 5th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] WALTER S. HARSHA,
Clerk of the Circuit Court of the United States,
Eastern District of Michigan.

Allowed by—
H. B. BROWN, *Dist. Judge.*

Filed in clerk's office, April 5, 1884.
WALTER S. HARSHA, *Clerk.*

2 The United States of America to William Reynolds, administrator of the estate of Warren A. Sherwood, deceased, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on the first Monday of May next, pursuant to a writ of error filed in the office of the clerk of circuit court of the United States for the eastern district of Michigan, wherein Charles E. Hess is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final order and judgment of said court remanding said cause to the circuit court for the county of Jackson, in the State of Michigan, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness my hand at Detroit, in said district, this fifth day of April, in the year one thousand eight hundred and eighty-four.

HENRY B. BROWN,
District Judge.

3 UNITED STATES OF AMERICA, }
Eastern District of Michigan, } *ss:*

On this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and eighty-four, personally appeared before me, the subscriber, Benjamin B. Kingsbury, and makes oath that he delivered a true copy of the within citation to the defendant in error, William Reynolds, administrator of the estate of Warren A. Sherwood, deceased, and also that he delivered a true copy of the within citation to Vernon H. Smith, attorney of record of said defendant in error, at Ionia, in the State of Michigan, on the twenty-ninth day of April, A. D. 1884.

BENJAMIN B. KINGSBURY.

Sworn to and subscribed before me, at Detroit, in said district, this 29th day of April, A. D. 1884.

WALTER S. HARSHA,
Clerk U. S. Circuit Court, East. Dist. of Mich.

Filed in clerk's office April 29, 1884.

WALTER S. HARSHA, *Clerk.*

4 In the Supreme Court of the United States.

CHARLES E. HESS, Plaintiff in Error,

vs.

WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, Deceased, Defendant in Error.

Know all men by these presents that we, Charles E. Hess, Benjamin B. Kingsbury, Henry Newbegin, and S. T. Sutphen, the last three of the city and county of Defiance, and State of Ohio, are held and firmly bound unto William Reynolds, of the county of Ionia and State of Michigan, as administrator of the estate of Warren A. Sherwood, deceased, in the sum of five hundred dollars, to be paid to the said William Reynolds, his executors, administrators, and successors in office, in the said trust; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals; dated this 8th day of April, 1884.

Whereas the above-named Charles E. Hess has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action and the order remanding the said cause to the circuit court of Jackson county of Michigan by the circuit court of the United States for the eastern district of Michigan: Now, therefore, the condition of the above

obligation is such that if the above-named Charles E. Hess shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation to be void; otherwise in full force and virtue.

CHARLES E. HESS. [SEAL.]
BENJAMIN B. KINGSBURY. [SEAL.]
S. T. SUTPHEN. [SEAL.]
HENRY NEWBEGIN. [SEAL.]

Attest as witnesses:
F. W. STRUDIVANT.
E. SQUIRE.

All interlineations made before signing.
Attest: RALPH L. RAINBOW.

STATE OF OHIO, } ss:
Defiance County }

Henry Newbegin and S. T. Sutphen, being sworn, severally depose and say: That they are the sureties named in the within bond; that they are resident in the county of Defiance, and State of Ohio, and are severally property holders therein; that they are each worth the sum of five hundred dollars over and above their several debts and liabilities, and exclusive of property, by law exempt from execution; that they each have property in the State of Ohio liable to execution of the value of more than five thousand dollars ($5,000.00).

HENRY NEWBEGIN.
S. T. SUTPHEN.

Subscribed by Henry Newbegin and S. T. Sutphen in my presence, and by them severally sworn to before me, this 30th day of April, A. D. 1884.

[SEAL.] RALPH L. RAINBOW,
Notary Public.

Approved:
H. B. BROWN, *Dist. Judge.*

5 Circuit Court for the County of Ionia.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,
vs.
The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellees.

To the Honorable G. Thompson Gridley, circuit judge of the fourth judicial circuit of the State of Michigan:

The petition of Charles E. Hess, the above appellant, by Mark S. Wolcott, his attorney, respectfully showeth that the appeal from the decision of the commissioners in the above estate to the circuit court for the county of Ionia was taken on or about the first day of June,

1878, and that since said appeal was taken the said estate, and the administration thereof, have been represented in said circuit court by the law firm of Smith and Sessions, of the city of Ionia, composed of Vernon H. Smith and Henry C. Sessions, who were at the time of said appeal, and are now, the attorneys of record in said cause for such estate. Your petitioner further showeth that since the said appeal was taken as aforesaid the said Vernon H. Smith, who was a member of said law firm of Smith and Sessions, has been elected to the office of judge of the eighth judicial circuit of this State, and has qualified as such and entered upon the duties of his office; that the said county of Ionia is within said judicial circuit, and the said eighth judicial circuit adjoins the fourth judicial circuit of this State. Your petitioner further saith that the said Vernon H. Smith is not qualified to try the above-entitled cause, by reason of his employment in the same as hereinbefore set forth. Wherefore your petitioner asks that this court will make an order transferring the said cause to the circuit court for the county of Jackson, in which county the attorney of said appellant resides.

CHARLES E. HESS,
By MARK S. WOLCOTT,
His Attorney.

MARK S. WOLCOTT,
Att'y for Petitioner.

STATE OF MICHIGAN, } ss:
Jackson County, }

Mark S. Wolcott, of the said county, being duly sworn, says: That he is the attorney of the appellant in the above cause, and that as such he has subscribed his name to the above petition; that said appellant is not a resident of this State, but resides in the State of Ohio; that said appellant has no knowledge of the facts set forth in said petition, as this deponent believes, and that said facts are within the knowledge and belief of this deponent, and that said petition is true, as this deponent verily believes.

MARK S. WOLCOTT.

Subscribed and sworn to before me, the 2nd day of March, 1883.
CHAS. A. BLAIR,
Notary Public, Jackson Co., Mich.

We hereby admit due personal service on us of a copy of the within petition and order.
Ionia, March 7th, 1883.

HENRY C. SESSIONS,
Att'ys for within Appellees.

6 The Circuit Court for the County of Ionia.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellee.

On reading the petition of the above appellant by Mark S. Wolcott, his attorney, asking for the removal of this cause from the circuit court for the county of Ionia to the circuit court for the county of Jackson, for the reason that the circuit judge of the said circuit court for the county of Ionia is disqualified to try the same because he has been employed in the cause as counsel for the above defendant, and on hearing the above-named Mark S. Wolcott, attorney for the said appellant in support thereof, and for an order fixing a time for hearing the same, it is ordered that the said petition be heard before the undersigned at chambers, at his office, in the courthouse, in the city and county of Jackson, on the 17th day of March, 1883, at three o'clock in the afternoon of said day. It is further ordered that the attorney of the appellant cause a copy of the said petition and a copy of this order to be personally served on the attorneys of the appellee at least six days before the time set for the hearing of said petition.

Dated March 2, 1883.

G. T. GRIDLEY,
Circuit Judge, Fourth Judicial Circuit.

7 The Circuit Court for the County of Ionia.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioner on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellees.

Application having been made to the undersigned, judge of the 4th judicial circuit of the State of Michigan, by the above appellant, by petition, to remove the above-entitled cause from the circuit court for the county of Ionia to the circuit court for the county of Jackson, for the reason that the circuit judge of the circuit court for Ionia county is disqualified for trying the same in having been counsel for the above appellees prior to his election to said office of circuit judge, on filing due proof of the service of an order made in the above cause on the 2nd day of March, 1883, upon the attorneys of the above appellees on the seventh day of March, 1883, and upon hearing Mark S. Wolcott, of counsel for said petitioner, and no one appearing to oppose the said petition, and it appearing to the court that the said Vernon H. Smith, judge of the said circuit court for the county of Ionia, is disqualified to try said cause, for the reason that he has heretofore acted as counsel for the appellees in the above cause, it is hereby ordered, on motion of said counsel, that the above-

entitled cause be, and the same is hereby, transferred from the circuit court for the county of Ionia to the circuit court for the county of Jackson for the cause above mentioned.

Dated March 17th, 1883.

G. T. GRIDLEY,
Circuit Judge.

8 The Circuit Court for the County of Ionia.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellee.

Application having been made to the undersigned, judge of the 4th judicial circuit of the State of Michigan, by the above appellant, by petition, to remove the above-entitled cause from the circuit court for the county of Ionia to the circuit court for the county of Jackson, for the reason that the circuit judge for the circuit court for the county of Ionia is disqualified for trying the same in having been counsel for the above appellee prior to his election to said office of circuit judge, on filing due proof of the service of an order made in the above cause on the 2nd day of March, 1883, upon the attorneys of the above appellees on the seventh day of March, 1883, and upon hearing Mark S. Wolcott, of counsel for said petitioner, and no one appearing to oppose the said petition, and it appearing to the court that the said Vernon H. Smith, judge of the said circuit court for the county of Ionia, is disqualified to try said cause, for the reason that he has heretofore acted as counsel for the appellees in the above cause:

It is hereby ordered, on motion of said counsel, that the above-entitled cause be, and the same is hereby, transferred from the circuit court for the county of Ionia to the circuit court for the county of Jackson for the cause above mentioned.

Dated March 17, 1883.

G. T. GRIDLEY,
Circuit Judge.

STATE OF MICHIGAN, } *ss:*
Jackson County Clerk's Office, }

I, Chas. E. Snow, clerk of the county of Jackson, and of the circuit court thereof, the same being a court of record, having a seal, do hereby certify that I have compared the foregoing copy of an order with the original of record in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court for the county of Jackson, at the city of Jackson, this twentieth day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] CHAS. E. SNOW, *Clerk.*

9 *Commissioners' Notice.*

We, the undersigned, having been appointed by the judge of probate of Ionia county, Michigan, commissioners to receive, examine, and adjust all claims and demands against Warren A. Sherwood, deceased, notice is hereby given that we will meet at the office of Seneca Woolford, in the village of Hubbardston, Ionia county, Michigan, the 21st day of September, A. D. 1877, and on the 29th day of December, A. D. 1877, at 9 o'clock a. m. on each of said days, for the purpose of receiving and examining claims against said deceased, and six months from the 30th day of June, A. D. 1877, is allowed to creditors in which to present their claims for allowance.

Dated August 15th, A. D. 1877.

WILLIAM REYNOLDS,
SENECA WOOLFORD,
Commissioners.

10 STATE OF MICHIGAN, } *ss:*
County of Ionia, }

Seneca Woolford, of the township of North Plains, in the county of Ionia and State of Michigan, being duly sworn, deposes and says: That on the 15th day of August, A. D. 1877, he posted four notices, of which the annexed printed notice is a true copy, in four public places in the township of North Plains, county and State aforesaid, viz: One in the post office, one at John L. Startze's drug store, one at Charles L. Struck's foundry, and one at Alonzo A. Sunderlies' flouring mill; all of the above-mentioned places being in the township of North Plains, county and State aforesaid.

SENECA WOOLFORD.

Sworn and subscribed to before me, this 15th day of August, A. D. 1877.

WALTER J. TABOR,
Notary Public in and for Ionia County, Michigan.

11 *Commissioners' Notice.*

We, the undersigned, having been appointed by the judge of probate of Ionia county, Michigan, commissioners to receive, examine, and adjust all claims and demands against Warren A. Sherwood, deceased, notice is hereby given that we will meet at the office of Seneca Woolford, in the village of Hubbardston, Ionia county, Michigan, the 21st day of September, A. D. 1877, and on the 29th day of December, A. D. 1877, at 9 o'clock a. m. on each of said days, for the purpose of receiving and examining claims against said deceased, and six months from the 30th day of June, A. D. 1877, is allowed to creditors in which to present their claims for allowance.

Dated August 15th, A. D. 1877.

WILLIAM REYNOLDS,
SENECA WOOLFORD,
Commissioners.

12 STATE OF MICHIGAN, } ss:
County of Ionia, }

A. V. Phister, printer and publisher of the Hubbardston Advertiser, a weekly newspaper regularly and statedly printed and published in said county of Ionia during the last six years and upwards, being duly sworn, deposes and says: That a notice, of which the annexed printed copy taken from said newspaper, is a true copy thereof, was published in said newspaper at least once in each week for three successive weeks; that the first publication of the same was on Thursday, the 16th day of August, A. D. 1877, and the last publication thereof on Thursday, the 6th day of Sept., A. D. 1877, and that it was published on Thursday of each and every intermediate week of the days last aforesaid; that said notice contains two folios, and that my fees for so publishing the same are three dollars and fifty cents; and further saith not.

A. V. PHISTER.

Subscribed and sworn to before me, this 20th day of March, A. D. 1878.

SENECA WOOLFORD,
Notary Public in and for Ionia County, Mich.

13 STATE OF MICHIGAN, } ss:
County of Ionia, }

Probate Court for said County.

In the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

By W. H. Woodworth, judge of probate of said county, to William Reynolds and Seneca Woolford, of said county, Greeting:

You are hereby nominated and appointed commissioners, with full power and authority to receive, examine, and adjust all claims and demands of all persons against the estate of Warren A. Sherwood, late of said county, deceased, and, being first duly sworn to the faithful discharge of your duties, within sixty days from the date hereof, you are to appoint convenient times and places when and where you will meet for the purpose of examining and allowing such claims, and give notice thereof, and of the time hereby limited for creditors to present their claims, by posting up the same in four public places in said county, to wit, four public places in the township of North Plains, four weeks previous to your first meeting, and also by publishing such notice at least four weeks successively in the Advertiser, a newspaper printed in the county of Ionia, within sixty days from the 30th day of June, 1877, and four weeks previous to your first meeting. And either of you are authorized to administer oaths to parties and witnesses, when the same shall be required or proper for the investigation and trial of questions before you. And six months from the date hereof are allowed by said court to the creditors of said estate to present their claims to you for examination and allowance; at the expiration of which time, or as soon thereafter as you shall be able to complete the hear-

ing of the claims presented, you are to make a report of your doings to said probate court, embracing lists of the claims presented or exhibited in off set, and stating how much thereof was allowed and how much disallowed, together with a final balance, which shall include interest to the date of your report, whether in favor of such creditor or estate. You are to note in distinct classes the claims allowed by you, in pursuance of this warrant, in the following order: 1st. The expense of the last sickness of said deceased. 2nd. Debts having a preference by the laws of the United States. 3rd. Debts due other creditors. You will particularly state the manner of giving said notice to the said claimants, and exhibit a plain and true account of your care and labor in examining the claims aforesaid, that you may be entitled to mete recompense therefor out of the said estate. Finally, you are to make due return of this commission, with your doings thereon, in all things required by law.

Witness the said W. H. Woodworth, judge of probate as aforesaid, under his hand and the seal of said court, at Ionia, this 30th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

[L. S.] W. H. WOODWORTH,
Judge of Probate for said County.

14 STATE OF MICHIGAN, } *ss:*
County of Ionia, }

On the fifteenth day of August, A. D. 1877, then personally appeared William Reynolds and Seneca Woolford, the above-named commissioners, and made oath that they would faithfully and impartially discharge the trust reposed in them by the foregoing commission, as required by law.

Before me— D. R. COREY,
Notary Public, Ionia County, Mich.

15 COUNTY OF IONIA, *ss:*

To the probate court of said county:

We, the undersigned commissioners, appointed by the foregoing warrant to receive, examine, and adjust all claims and demands of all persons against the estate of Warren A. Sherwood, late of said county, deceased, do hereby certify and return to the probate court of said county that, having first taken the oath prescribed by law for the faithful discharge of our duty, we have, within sixty days after our appointment, given public notice of the claimants of said estate and the time limited by said warrant for presenting their claims, and that we would meet on the 21st day of September, A. D. 1877, and on the 29th day of December, A. D. 1877, at 9 o'clock a. m. on each of said days, at the office of Seneca Woolford, in the village of Hubbardston, in said county, for the purpose of receiving, examining, and allowing such claims; that such notice was given by posting the same in four public places in said county, to wit, in the township of North Plain, one in the post office, one at John E. Swartz's drug store, one at Charles L. Struck's foundry, and one at Alonzo A.

Sunderlies' flouring mill, and also by publishing a copy thereof in The Advertiser, a newspaper printed in the county of Ionia, for four weeks successively, *in The Advertiser*, as in said warrant directed, and as more fully appears by the annexed affidavit thereof.

And we do further report that we have, in pursuance of said notice, met, received, examined, adjusted, and determined the personal claims and demands of all the several persons, as hereinafter named, in distinct classes, and in the manner hereinafter set forth opposite their names respectively in the several columns, as well as the claims filed in behalf of said estate in offset thereto, that is to say: The first column contains the names of the several claimants or creditors of said estate, and the character of each claim; the second column shows the amount of such claim; the third column shows the amount, if any, of the claims which was disallowed; the fourth column shows the amount, if any, of the offset filed on behalf of said estate against such claim; the fifth column shows the amount of such offset, if any, which was disallowed; the sixth column shows the amount, if any, of the balance allowed in favor of such creditor; the seventh column shows the amount, if any, of the final balance allowed in favor of such estate, and the eighth shows the names, if any, of the respective parties who objected to the allowance of such final balance.

And we further report that the amount of such final balance includes interest on the sum due on the claims presented or filed in offset as aforesaid down to the date of this our report, and that the amount of our fees for service in the premises is stated opposite our names respectively.

16 STATE OF MICHIGAN, } ss:
Ionia County. }

Probate Court for the County of Ionia.

In the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

To Hon. W. H. Woodworth, judge of probate for the county of Ionia.

The undersigned, of Jefferson City, in the State of Missouri, by Mark S. Wolcott, his attorney in fact, being a creditor of said deceased, hereby gives notice of and makes application for an appeal to the circuit court for said county, from the decision of the commissioners heretofore duly appointed to receive, examine, and adjust all claims and demands of all persons against the said deceased, Warren A. Sherwood, the claim of Charles E. Hess, aforesaid, against said said estate, made in their report filed in said probate court on the 21st day of March, 1878, for the following reason:

Because said commissioners disallowed the whole amount of said claim against said estate the same being more than twenty dollars, to wit, the sum of three thousand two hundred and fifty-seven dollars and sixty-one cents ($3,257.61).

Dated March 28th, 1878.

CHARLES E. HESS,
By MARK S. WOLCOTT,
His Attorney in Fact.

17 STATE OF MICHIGAN, } ss:
Ionia County. }

Probate Court for said County.

In the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

Know all men by these presents that we, Charles E. Hess, of Jefferson City, in the State of Missouri, as principal, and Grove H. Wolcott and Joseph Howard as sureties, are held, and firmly bound unto Albert G. Russell, administrator of the estate of Warren A. Sherwood, deceased, being the adverse party, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Albert G. Russell or to his certain attorney, heirs, executors, successors, or assigns, to which payment, well and truly be made, we bind ourselves and heirs, executors and administrators, and each and every of them, firmly by these presents.

Sealed with our seals; dated the first day of May, A. D. 1878.

The condition of this obligation is such that whereas the said Charles E. Hess has made and filed an application and notice of appeal to the circuit court for the county of Ionia from the decision of the commissioners appointed to receive, examine, and adjust all claims and demands of all persons against said deceased, disallowing the claim of said Charles E. Hess, against said estate made in their report, filed in said probate court on the 28th day of March, 1878, as in said application stated, and for the reasons therein alleged now, therefore, if the said appellant, Charles E. Hess shall diligently prosecute said appeal to effect and pay all the damages and costs which may be awarded against him on such appeal, then the preceding obligation to be void; otherwise to remain in full force and virtue.

CHARLES E. HESS. [SEAL.]
GROVE H. WOLCOTT. [SEAL.]
JOSEPH HOWARD. [SEAL.]

18 STATE OF MICHIGAN, } ss:
County of Jackson, }

On this 13th day of May, A. D. 1878, before me, a notary public & judge of probate for said county, personally appeared Grove H. Wolcott, known to me to be the same person who executed the above bond, and being by me duly sworn, says that he is a resident of the city of Jackson in said county, and is possessed of real estate situate in said city of the value of three thousand dollars, over and above all debts, liabilities, & exemptions.

LEWIS M. POWELL,
Notary Public.

Joseph Howard, the other surety, has been sworn as to his responsibility, and appears to be worth fifty thousand dollars over and above all exemptions and liabilities.

L. M. POWELL.

STATE OF MICHIGAN, } ss:
County of Ionia, }

At a session of the probate court for the county of Ionia, held at the city of Ionia, the 14th day of May, A. D. 1878, I examined and do approve the foregoing bond, and order that the same be filed and recorded.

W. H. WOODWORTH,
Judge of Probate.

19 STATE OF MICHIGAN, } ss:
County of Ionia, }

At a session of the probate court for said county, held at the probate office in the city of Ioaia, on the fourteenth day of May, in the year one thousand eight hundred and seventy-eight, present, W. H. Woodworth, judge of probate.

In the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

On reading and filing the application of Charles E. Hess for an appeal to the circuit court of said county, from the decision of the commissioners appointed to receive, examine, and adjust claims against said estate, wholly disallowing his said claim against said estate of the sum of three thousand one hundred and eleven and 02-100 dollars, by their report, filed March 21st, A. D. 1878, and on reading and filing the appeal bond of said appellant, duly approved May 14th, A. D. 1878, it is ordered that said appeal be, and the same is hereby, allowed. And it is further ordered that notice of said appeal and the hearing thereon in the circuit court for the county of Ionia, be given to Albert G. Russell, by delivering to said Albert G. Russell, administrator of said estate, a certified copy of this order and of said application within twenty days from the date of this order, and by serving notice thereafter of the hearing of said appeal in said circuit court, according to the course and practice of said circuit court.

W. H. WOODWORTH,
Judge of Probate.

20 STATE OF MICHIGAN, } ss:
County of Ionia, }

Probate Court for said County.

I, W. H. Woodworth, do hereby certify that I am judge of probate for said county, and acting as clerk of said probate court, I have compared the foregoing copy of commissioners' warrant and report, application for appeal from report of the commissioners on claims, appeal bond, and order allowing appeal, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom and the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said probate court, at the city of Ionia, this twenty-third day of May, A. D. 1878.

[SEAL.]

W. H. WOODWORTH,
Judge af Probate.

21 STATE OF MICHIGAN, } ss:
County of Ionia, }

M. L. Weatherwax, being duly sworn, deposes and says: That on the sixteenth day of May, A. D. 1878, he personally served on Albert G. Russell, administrator of the estate of Warren A. Sherwood, deceased, at Hubbardston, Ionia Co., Mich., a true and certified copy of an order made by the judge of probate of said county, and a true and certified copy of the application for appeal in the matter of the estate of Warren A. Sherwood, deceased, of which order and application the annexed are true and compared copies, by delivering said copy of application for appeal and copy of said order, duly certified under the seal of said probate court, personally to said Albert G. Russell, at Hubbardston aforesaid.

H. L. WEATHERWAX.

Subscribed and sworn to before me, this 16th day of May, A. D. 1878.

WALTER J. TABOR,
Notary Public in and for Ionia County, Mich.

22 STATE OF MICHIGAN, } ss:
County of Ionia, }

At a session of the probate court for said county, held at the probate office in the city of Ionia, on the fourteenth day of May in the year one thousand eight hundred and seventy-eight.

Present: W. H. Woodworth, judge of probate.

In the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

On reading and filing the application of Charles E. Hess for an appeal to the circuit court of said county from the decision of the commissioners appointed to receive, examine, and adjust claims against said estate of the sum of three thousand one hundred and eleven & $\frac{2}{100}$ dollars, by their report filed March 21st, A. D. 1878, and on reading and filing the appeal bond of said appellant, duly approved May 14th, A. D. 1878:

It is ordered that said appeal be, and the same is hereby, allowed; and it is further ordered that notice of said appeal and the hearing thereof in the circuit court for the county of Ionia be given to Albert G. Russell, by delivering to said Albert G. Russell, administrator of said estate, a certified copy of this order and of said application for appeal, within twenty days from the date of this order, and by serving notice thereafter of the hearing of said appeal in said circuit court according to the course and practice of said circuit court.

W. H. WOODWORTH,
Judge of Probate.

23 STATE OF MICHIGAN, } ss:
Ionia County, }

Probate Court for the County of Ionia.

In the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

To Hon. W. H. Woodworth, judge of probate for the county of Ionia:

The undersigned, of Jefferson City, in the State of Missouri, by Mark S. Wolcott, his attorney-in-fact, being a creditor of said deceased, hereby gives notice of and makes application for an appeal to the circuit court for said county, from the decision of the commissioners heretofore duly appointed to receive, examine, and adjust all claims and demands of all persons against the said deceased, Warren A. Sherwood, the claims of Charles E. Hess aforesaid, against said estate made in their report, filed in said probate court on the 21st day of March, 1878, for the following reasons:

Because said commissioners disallowed the whole amount of said claim against said estate, the same being more than twenty dollars, to wit, the sum of three thousand two hundred and fifty-seven dollars and sixty-one cents $3,257.61.

Dated March 28th, 1878.

CHARLES E. HESS,
By MARK S. WOLCOTT,
His Attorney-in-Fact.

24 STATE OF MICHIGAN, } ss:
County of Ionia, }

Probate Court for said County.

I, William A. Woodworth, do hereby certify that I am judge of probate for said county, and acting clerk of said probate court, do hereby certify that I have compared the foregoing copy of the order of this court allowing the appeal of Charles E. Hess from the report of the commissioners on claims in the matter of the estate of Warren A. Sherwood, deceased, and of the application for appeal in the matter of the estate of Warren A. Sherwood, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said probate court at the city of Ionia, this 15th day of May, A. D. 1878.

[SEAL.]

W. H. WOODWORTH,
Judge of Probate.

STATE OF MICHIGAN:

In the Circuit Court for the County of Ionia.

CHARLES E. HESS, Plaintiff and Appellant,

vs.

The Estate of WARREN A. SHERWOOD, Deceased, Defendant.

On appeal from the decision of the comm'rs.

JULY 1*st*, 1878.

This cause having been duly appealed from the probate court, and the entry fee having been paid, on motion of M. S. Wolcott, attorney for plaintiff and appellant, ordered that the appearance of said plaintiff and appellant be, and the same is hereby entered.

M. S. WOLCOTT,
Att'y for Plaintiff and Appellant.

H. P. TAYLOR, *D'y Clerk.*

25 STATE OF MICHIGAN:

The Circuit Court for the County of Ionia.

In the Matter of the Appeal from Probate Court in the Claim of CHARLES E. HESS from the Decision of the Commissioners in Estate of WARREN A. SHERWOOD.

It is hereby stipulated by and between the attorneys for the respective parties that the above-entitled cause shall stand continued until the August term of this court.

Dated April 30th, 1879.

SMITH & SESSIONS,
Att'ys for Estate.
MARK S. WOLCOTT,
Att'y for Charles E. Hess.

26 STATE OF MICHIGAN:

The Circuit Court for the County of Ionia.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellee.

I, Ralph Sessions, clerk of the county and court aforesaid, do hereby certify that the attached and foregoing papers comprise the original exemplification of record from the probate court, the return of service of application for appeal, and the order of the probate judge allowing the appeal, the appearance of the claimant and appellant, as copied from the common rule book, and a stipulation for a continuance, and the whole of such original papers filed in said cause, and the whole of such originals; and said copy of an order of appearance of the appellant is a true and compared copy of the original entry of appearance and the whole thereof. And I further cer-

tify that said original papers and said copy comprise the whole of said cause remaining of record in my office.

In testimony whereof, I have hereunto set my hand and the seal of the said circuit court, this twenty-second day of March, A. D. 1883.

[SEAL.]

RALPH D. SESSIONS,
Clerk Circuit Court, Co. Ionia, Mich.

27 At a general term of the circuit court for the county of Jackson, continued and held at the court-house, in the city of Jackson, on Wednesday, the 18th day of April, A. D. 1883.

Present: Hon. G. T. Gridley, circuit judge.

In the Matter of the Appeal of CHARLES E. HESS from the Decision and Report of Commissioners on Claims in Estate of WARREN A. SHERWOOD, Deceased.

In this cause it is ordered by the court now here that an issue be framed and formed herein for the trial of the same, and that this order be executed in the following manner, viz:

1st. That said claimant, on or before sixty days from this date, cause to be filed with the clerk of this court, and serve a copy thereof on the administrator of said estate or his attorney, a statement in writing of his claim in this cause against said estate, and that he accompany the same with an account in writing, to wit, the particulars thereof.

2nd. That the administrator of said estate, within thirty days after such service of the statement of said claimant's claim as aforesaid, cause to be filed with the clerk and served on said claimant or his attorney his answer or denial of said claimant's claim, and any other matter or difference that he may claim to have against the claim of said claimant.

In this cause, on motion of the attorneys for the appellee, after hearing counsel for the appellant, ordered that said cause be continued, upon condition that said appellee pay to the appellant the costs of the present term, upon taxation thereof, including an attorney fee of five dollars.

G. T. GRIDLEY,
Circuit Judge.

28 The Circuit Court for the County of Jackson.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellee.

To Messrs. SMITH and SESSIONS, *Att'ys for Appellee:*

The appellant in this cause claims to recover from the said estate a certain sum of money due to him by virtue of an agreement, in

writing, executed by the said Warren A. Sherwood in his lifetime, in words and figures as follows, to wit:

"ST. LOUIS, Mo., *May the 11th*, 1875.

"Whereas I, Warren A. Sherwood, of St. Louis, Mo., have purchased of F. J. Christy the undivided one-half interest in letters patent as granted to said Christy on the 6th day of January, 1874, and numbered 146,231, excepting the States of Missouri and Kansas, and the counties of Richland and Jersey, in the State of Ills., and also three hundred and fifty shares of stock in the Missouri Water Elevator Manufacturing Company, of St. Louis, Mo., for which I do hereby promise and agree to pay to said Christy, sixty days after date, the sum of five thousand dollars, [it] being agreed and understood that all notes I hold against said Christy are to be taken up by said Christy on the payment of said five thousand dollars.

"W. A. SHERWOOD."

Which said agreement was, for a valuable consideration, sold and assigned to John Schomaker by said Christy, and said assignment indorsed on the same in manner as follows, to wit: "For value received, I assign the within note to John Schomaker. F. J. Christy." And further assigned, by the said John Schomaker, for a valuable consideration, to Charles E. Hess, the above appellant, which assignment is endorsed on said agreement as follows, to wit: "For value received, I assign the within note to Charles E. Hess. John Schomaker." That on the 27th day of December, 1877, the said agreement was presented by said appellant to the probate court for the city of St. Louis, in the State of Missouri, as a claim for allowance against the said estate, then being administered in said court, and that there was allowed by the judge of probate of said court to said appellant, as due to him upon the said agreement, the sum of three thousand two hundred and fifty-seven dollars and sixty-one cents ($3,257.61), and that said amount was ascertained to be the balance due upon said agreement for principal ($5,000), and interest at six per cent. from July 11th, 1875, to Dec. 27th, 1877, after deducting the amount of a certain judgment recovered against said F. J. Christy by said Warren A. Sherwood on the 15th day of November, 1876, in room number five of the circuit court of St. Louis, Mo., for the sum of two thousand and eighty-one ($2,081) dollars, with
29 interest thereon from Nov. 15th, 1876, to the 27th day of December, 1877, at eight per cent. per annum, and the price of a certain well augur, being the sum of two hundred and thirteen dollars, said agreement or note, with interest as aforesaid, amounting to the sum of $5,737.50, and said several set-offs amounting to $2,479.89. The appellant claims that there is due to him upon said agreement from said estate the sum of three thousand two hundred and fifty-seven dollars and sixty-one cents ($3,257.61), with interest thereon at the rate of six per cent. per annum from the 27th day of December, 1877, less the sum of $146.59 paid upon said

claims by Mathew D. Lewis, public administrator of the city of St. Louis aforesaid, to said appellant Dec. 27th, 1877.

June 9th, 1883.

MARK S. WOLCOTT,
Attorney for Appellant.

30 In the Circuit Court for the County of Jackson.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Appellee.

Now comes William Reynolds, the administrator of said estate, and, in behalf of said estate of Warren A. Sherwood, deceased, demands a trial of the matters and things set forth in the paper filed in this cause, purporting to be a statement of the claim made against said estate by said appellant.

Dated July 5th, '83.

SMITH & SESSIONS,
Att'ys for Appellee.

And notice is hereby given to said appellant that on the trial of said cause in said court in behalf of said estate we will show that said appellant has no valid or legal claim against said estate; that said contract or writing upon which he proposes to recover against said estate, and upon which his said claim is based, was never signed by said Warren A. Sherwood or any one in his behalf, and was never executed or delivered by him or any one in his behalf; and will further show that the notes referred to in said appellant's statements of his claim in this cause, and in the said contract, relied upon by him, have not been taken up by said Hess or any one for him; and shall claim and demand that they be taken up before any recovery can be had on said pretended contract; and will further show that said notes exceed in amount the amount claimed to be due on said pretended contract, and amount at this date to a larger sum, to wit, the sum of five thousand dollars.

And in behalf of said estate will further show that Hess has not and never did have any legal claim against said estate; and in behalf of said estate, and in behalf of said administrators, we deny any and all liability on the part of said estate in any amount whatever to said appellant.

Dated July 5, 1883.

SMITH & SESSIONS,
Att'ys for Appellee.

31 STATE OF MICHIGAN:

The Circuit Court for the County of Jackson.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased, Appellee.

IONIA COUNTY, *ss:*

Julia C. Russell, being duly sworn on her oath, deposes and says: That she makes this affidavit for and in behalf of the estate of Warren A. Sherwood, deceased, and in behalf of Wm. Reynolds, administrator of said estate.

Deponent further says she is a sister of Warren A. Sherwood, deceased, and is well acquainted with his handwriting, and that said Warren A. Sherwood did not sign or execute the written instrument on which this action is brought, and that he did not authorize any other person to sign or execute the same in his name or behalf.

JULIA C. RUSSELL.

Sworn to and subscribed before me, this 5th day of July, A. D. 1883.

A. V. PHISTER,
Notary Public, Ionia Co., Mich.

32 STATE OF MICHIGAN, } *ss:*
County of Ionia, }

Henry C. Sessions, being duly sworn, deposes and says: That he is one of the firm of Smith & Sessions, attorneys for the defendant in this cause, and that on the 9th day of July, A. D. 1883, he served on Mark S. Wolcott, attorney for appellant, a true copy of the annexed plea, notice, and affidavit, denying the execution of the written instrument on which claim is made, by putting the said copies duly attached in the post office at Ionia, Michigan, post-paid, in registered letter, and plainly directed to said Mark S. Wolcott, at Jackson, Mich., that being said Wolcott's place of business.

H. C. SESSIONS.

Sworn to and subscribed before me, this 9th day of July, A. D. 1883.

ADOLPHUS A. ELLIS,
Notary Public in and for Ionia Co., Mich.

In the Circuit Court for the County of Jackson.

In the Matter of the Appeal of CHARLES E. HESS, Appellant,

vs.

The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, deceased, Appellee.

SIR: You will please to take notice that the above-entitled cause will be brought on for trial at the next term of the above court, to

be held at the court house, in the city of Jackson, the 10th day of September, 1883.

Yours, &c., MARK S. WOLCOTT,
Att'y for Appellant.

To Messrs. Smith & Sessions,
Att'ys for Appellee.

33 State of Michigan:

In the Circuit Court of Jackson County.

In the Matter of the Appeal of Charles E. Hess, Appellant and Plaintiff,
vs.
William Reynolds, Administrator of the Estate of Warren A. Sherwood, Deceased, Appellee and Defendant.

On Appeal from the Decision and Report of Commissioners on Claims in Matter of Estate of Warren A. Sherwood.

State of Colorado, } ss:
Saguache County, }

I, Charles E. Hess, being duly sworn, do say that I am appellant and plaintiff in the above-entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence the said appellant and plaintiff will not be able to obtain justice in said State court; and I do further say that I am a citizen of and resident in the State of Colorado.

CHARLES E. HESS.

State of Colorado, } ss:
Saguache County, }

Subscribed by the said Charles E. Hess, in my presence, and by him sworn to before me, this 1st day of September, 1883.

[seal.] NORMAN P. WHITE,
Notary Public.

34 State of Colorado, } ss:
County of Saguache, }

I, Frank P. Pertschey, county clerk in and for said county, do hereby certify that Norman P. White, Esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment a notary public in and for said county, duly commissioned, sworn, and acting as such and authorized to take the same; and further, that I am acquainted with his handwriting, and verily believe that the signature to said proof or acknowledgment is genuine, and that the annexed instrument is executed and acknowledged according to the laws of the State of Colorado.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county at Saguache, in said county, this first day of September, A. D. 1883.

[seal.] FRANK P. PERTSCHEY,
County Clerk.

35 *Petition for Transfer of Suit to Federal Court.*

STATE OF MICHIGAN:

In the Circuit Court of Jackson County.

CHARLES E. HESS, Plaintiff and Appellant,

vs.

WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, Defendant & Appellee.

On appeal from the report of commissioners on claims of said estate.

To the honorable the circuit court of Jackson county, State of Michigan:

Your petitioner, Charles E. Hess, respectfully shows that he is plaintiff in the foregoing entitled suit, and that the same was by him commenced on or about the first day of July, A. D. 1878, in the Ionia circuit court, and for good cause removed to the circuit court of Jackson county, Michigan, and is now pending therein; that at the time of bringing said suit your petitioner was a citizen and resident of the State of Missouri; that he is now a citizen and resident of the State of Colorado.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy between your petitioner and the said William Reynolds, administrator of the estate of Warren A. Sherwood, deceased, who is a citizen of the State of Michigan and resident thereof; that said action was brought by your petitioner for the purpose of obtaining adjudication of the allowance of a claim against the estate of Warren A. Sherwood, of which said William Reynolds is administrator, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that this suit has not been tried, but is now pending for trial in the circuit court of the State of Michigan for said county of Jackson, and that your petitioner desires to remove the same into the circuit court of the United States for the eastern district of Michigan, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision 3.

Your petitioner further says that he has filed the affidavit required by the statute in such cases, and offers herewith a bond executed by Grove H. Wolcott, of the city and county of Jackson, as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient according to the said act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for said eastern district of Michigan, pursuant to the aforesaid act of Congress in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray.

CHARLES E. HESS,
By MARK S. WOLCOTT,
His Attorney.

36 Know all men by these presents that we, Charles E. Hess, as principal, and B. B. Kingsbury, of Defiance, Ohio, and Grove H. Wolcott, of Jackson, Michigan, as sureties, are hereby held and firmly bound unto William Reynolds, administrator of the estate of Warren A. Sherwood, deceased, in the penal sum of two hundred and fifty dollars, lawful money of the United States; of the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such, that if the said Charles E. Hess shall enter and file, or cause to be entered and filed, in the next circuit court of the United States in and for the eastern district of Michigan, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of the county of Jackson and State of Michigan, in which Charles E. Hess is plaintiff and William Reynolds, administrator of the estate of Warren A. Sherwood, is defendant, and shall do such other acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then the obligation to be void; otherwise of force.

Witness our hands and seals, this 18th day of September, 1883.

CHARLES E. HESS. [L. S.]
B. B. KINGSBURY. [L. S.]
GROVE H. WOLCOTT. [L. S.]

STATE OF MICHIGAN, } *ss:*
County of Jackson, }

I, Grove H. Wolcott, of Jackson City, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Michigan, and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Michigan liable to execution of the value of more than five hundred dollars.

GROVE H. WOLCOTT.

Signed in my presence by Grove H. Wolcott, and by him sworn before me, this 18th day of September, A. D. 1883.

GEO. S. WILSON,
Justice of the Peace in and for Jackson County.

37 At a general term of the circuit court for the county of Jackson, continued and held at the court-house, in the city of Jackson, Saturday, Sept. 22, 1883.

Present: Hon. G. T. Gridley, circuit judge.

CHARLES E. HESS, Plaintiff & Appellant,
vs.
WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, Deceased.

On appeal from the report of commissioners on claims of estate.

On reading & filing the petition and affidavit of Charles E. Hess,

the plaintiff & appellant in the above-entitled cause, for the removal of said cause to the circuit court of the United States for the eastern district of Michigan, and it satisfactory appearing that said Charles E. Hess is a citizen of the State of Colorado, and that the said William Reynolds is a citizen of the State of Michigan, and the said plaintiff having made and filed his bond with Grove H. Wolcott & B. B. Kingsbury, sureties in pursuance of the statute of the of the United States requring the same.

On motion of Mark S. Wolcott, attorney for said plaintiff, it is ordered that said bond be accepted by this court, and the said petition for removal be, and the same is hereby, granted, and that said cause be no further proceeded with in this court.

G. T. GRIDLEY,
Circuit Judge.

38 STATE OF MICHIGAN, } ss:
Jackson County, Clerk's Office, }

I, Charles E. Snow, clerk of the county of Jackson and of the circuit court thereof, the same being a court of record, having a seal, do hereby certify that I have compared the foregoing copy of petition for removal, order transferring cause from Ionia to Jackson circuit, return of record from Ionia circuit, order framing issue, order continuance, statement appellant's claim, plea & notice, affidavit, petition for removal, bond for removal, order transferring cause to United States court, with the original of record in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court for the county of Jackson, at the city of Jackson, this 11th day of October, A. D. 1883.

[SEAL.]

CHARLES E. SNOW,
Clerk Circuit Court, Jackson Co., Michigan.

Endorsed: 6939. Charles E. Hess *vs.* Commissioners on Claims, Est. of Warren A. Sherwood. Transcript from Jackson county. Filed Nov. 6, 1883. Walter S. Harsha, clerk.

39 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Tuesday, the sixth day of November, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

In the Matter of the Appeal of CHARLES E. HESS, from the Decision and Report of the Commissioners on Claims in the Matter of the Estate of Warren A. Sherwood, Deceased.

Case removed from circuit court of Jackson county.

On filing a transcript of all papers filed and proceedings had in this cause, and on motion of counsel for party on whose behalf said

cause is removed, it is ordered that this cause do stand removed to and entered in this court as of this day.

40 STATE OF MICHIGAN:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

CHARLES E. HESS, Pl'ff & Appellant,
vs.
WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, Def't & Appellee.

On appeal from the report of the commissioners on claims of said estate.

Case attempted to be removed from the circuit court of Jackson county.

SIR: Please to take notice that we have been retained by the above-named defendant in the above-entitled cause for the purposes of the motion, a copy of which is hereto attached.

Dated at Ionia, Dec. 15th, 1880.

SMITH & SESSIONS,
Att'ys for Defendants.

To MARK S. WOLCOTT, *Att'y for Pl'ff & Appellant.*

41 STATE OF MICHIGAN:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

CHARLES E. HESS, Pl'ff & Appellant,
vs.
WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood.

On appeal from the report of the commissioners on claims of said estate.

Case attempted to be removed from the circuit court of Jackson county.

SIR: Please to take notice that we shall move the said court on behalf of the above-named defendant in the above-entitled cause, on the 24th day of December, A. D. 1883, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, for an order dismissing this cause and remanding the same back to the circuit court for the county of Jackson, from where it is claimed to have been removed to this court; which notice is based on the records and files in this cause, a copy of which motion is herewith served.

Dated at Ionia, this 15th day of December, A. D. 1883.

Yours, &c., SMITH & SESSIONS,
Att'ys for Def't.

To MARK S. WOLCOTT, *Attorney for Pl'ff & Appellant.*

42 STATE OF MICHIGAN:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

CHARLES E. HESS, Pl'ff & Appellant,

vs.

WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, Def't & Appellee.

On the appeal from the report of the commissioners on claims of said estate.

Case attempted to be removed from the circuit court of Jackson county.

Now comes said defendant, by Smith & Sessions, his attorneys, and moves the court now here that this cause be dismissed and remanded back to the circuit court for the county of Jackson, from which it is claimed to have been removed to this court, for the following reasons:

First. That said cause is not such a suit as can be removed to this court, and the same has never hereto, and this court has no jurisdiction of the same.

Second. That the matter in controversy in this proceeding is not such a suit as is contemplated by subdivision 3 of section 639 of the Revised Statutes of the United States, and was not commenced before any State court.

Third. The matter in dispute in this controversy is not a suit between a citizen of this State and a citizen of another State, but is a proceeding against the property of a deceased person.

Fourth. The matter in controversy in this cause was instituted before commissioners in the county of Ionia, and it has been once tried and determined, and it was appealed by the plaintiff to the Ionia circuit court, which is in the territory over which the circuit court for the western district of Michigan has jurisdiction, and on motion of the plaintiff under the statutes of the State of Michigan it was removed to the Jackson circuit court; that the jurisdiction of said circuit court at Jackson depends wholly on the statute, and the plaintiff cannot make the jurisdiction of that court the basis for a further removal into a district court where it could not have originally been removed.

Fifth. This is a probate matter, and must be governed and disposed of according to the statutes of the State of Michigan, and the Federal courts have no jurisdiction in the adjustment of probate matters.

This motion is based on the records and files in this cause.

Dated December 15th, 1883.

SMITH & SESSIONS,
Att'ys for Defendant.

43 STATE OF MICHIGAN, } ss:
County of Ionia, }

A. A. Ellis, being duly sworn, deposes and says: That on the 15th day of December, A. D. 1883, at the request of Smith & Sessions, att'ys for the within-named defendant, he served on Mark S. Wolcott, att'y for plaintiff and appellant, a notice of retainer and a notice of hearing of a motion, of which notices the foregoing are true copies, and at the same time and manner he served a true copy of the motion hereto annexed by placing the same in the post office at Ionia, Mich., postage fully prepaid, and plainly directed to said Mark S. Wolcott, at Jackson, Michigan, that being his place of business.

A. A. ELLIS.

Subscribed and sworn to before me, this 15th day of December, 1883.

ERNEST S. ELLIS,
Notary Public, Ionia Co., Mich.

Endorsed: 6939. The circuit court of the United States for the eastern district of Michigan. Chas. E. Hess, pl'ff & appellant; *vs.* William Reynolds, administrator, etc., etc. Motion to dismiss notice & proof of service. Filed in clerk's office Dec. 17th, 1883. Walter S. Harsha, clerk.

44 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room, in the city of Detroit, on Monday, the twenty-fourth day of December, in the year one thousand eight hundred and eighty.

Present: The Honorable Henry B. Brown, district judge.

Appeal of CHARLES E. HESS
vs.
Commissioners on Claims to Est. of WARREN A. SHERWOOD, Dec'd.

Case removed from Jackson county.

In this cause a motion by defendants for an order remanding case to circuit court for Jackson county is argued by Mr. Vernon H. Smith for defendants, and Mr. John D. Conely for plaintiff, and submitted.

45 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room, in the city of Detroit, on Monday, the seventh day of January, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

In the Matter of the Appeal of CHARLES E. HESS
vs.
The Decision and Report of the Commissioners on Claims in the Matter of the Estate of WARREN A. SHERWOOD, Deceased.

Case removed from Jackson county.

In this cause it is ordered that the motion to remand be reargued before a full bench in March.

46 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room, in the city of Detroit, on Tuesday, the eighteenth day of March, in the year one thousand eight hundred and eighty-four.

Present: The Honorable John Baxter, circuit judge, and the Honorable Henry B. Brown, district judge.

In the Matter of the Appeal of CHARLES E. HESS from the Decision and Report of the Commissioners on Claims in the Estate of WARREN A. SHERWOOD, Deceased.

Before full bench. Case removed from Jackson county.

This cause having been reserved for reargument before a full bench, on the motion of defendants to remand said cause, and said motion now coming on to be heard, without hearing the arguments of counsel, it is by the court now here ordered that said cause be, and the same is hereby, remanded to the circuit court for the county of Jackson, from which court said cause was removed into this court.

The district judge dissented.

47 THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify that the above and foregoing are true copies of all papers filed and proceedings had and entered in the cause therein entitled as the same appear of record and on file in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Detroit, in said district, this first day of May, in the year one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and eighth.

[SEAL.] WALTER S. HARSHA, *Clerk.*

[Endorsed:] Charles E. Hess, pl'ff in error, *v.* William Reynolds, adm'r of estate of Warren A. Sherwood, dec'd, def't in error. Return to writ of error.

48 In the Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-three.

CHARLES E. HESS, Plaintiff in Error,

vs.

WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, Deceased, Defendant in Error.

Afterwards, to wit, on the first Monday of May, 1884, in this term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Charles E. Hess, by ——— ———, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The said circuit court of the United States for the eastern district of Michigan erred in its order remanding the said cause to the circuit court for the county of Jackson, in the State of Michigan. And the said Charles E. Hess prays that the said order and judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said order and judgment.

HENRY NEWBEGIN,
Attorney for Plaintiff in Error.

[Endorsed:] Charles E. Hess, plaintiff in error, *vs.* William Reynolds, adm'r of estate of Warren A. Sherwood, def't in error. Return to writ of error and assignment of errors.

Endorsed on cover: E. Michigan C. C. U. S. No. 844. Charles E. Hess, plaintiff in error, *vs.* William Reynolds, administrator of the estate of Warren A. Sherwood, deceased. Filed 5th May, 1884.

113-73

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1884.

BAR ASSOCIATION

CHARLES E. HESS,
Plaintiff in Error,

vs.

WILLIAM REYNOLDS, ADMINISTRATOR OF THE ESTATE OF WARREN A. SHERWOOD, DECEASED,
Defendant in Error.

No. 844.
In Error to the Circuit Court of the United States, for the Eastern District of Michigan.

Statement and Brief for Plaintiff in Error.

HENRY NEWBEGIN and B. B. KINGSBURY,
Attorneys for Plaintiff in Error.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 175 MONROE STREET.
1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1884.

CHARLES E. HESS,
Plaintiff in Error,

vs.

WILLIAM REYNOLDS, ADMINISTRATOR OF THE ESTATE OF WARREN A. SHERWOOD, DECEASED,
Defendant in Error.

No. 844.

STATEMENT.

On the 27th day of December, 1877, the plaintiff in error, Charles E. Hess, then a citizen of Missouri, presented to the Probate Court of St. Louis, Missouri, for allowance against the estate of Warren A. Sherwood, then in course of administration, in charge of the public administrator in St. Louis, the claim in question, a note for the sale of an interest in a patent, and the same was allowed, and a dividend thereon paid by the public administrator having the said estate in charge.

The claim was then sent to Mark S. Wollcott, an attorney at Jackson, in the State of Michigan, to have the same allowed against the estate of the said deceased, then in course of administration in the

county of Ionia, Michigan, as ancillary to the administration in St. Louis.

The following provisions of the law of Michigan respecting the allowance of claims against the estates of deceased persons are taken from Howell's Annotated Edition of the General Statutes of Michigan, published in 1882, and by an act passed March 20, 1883, made evidence of the existing laws of Michigan.

Section 5888. When letters testamentary or of administration shall be granted by the judge of any court of probate, such judge may in his discretion, or upon the written application of the executor or administrator, appoint two or more suitable persons to be commissioners, to receive, examine and adjust all claims and demands against the deceased.

Section 5889. When such commissioners shall be appointed it shall be their duty to appoint convenient times and places when and where they will meet, for the purpose of examining and allowing the claims; and within sixty days after their appointment, they shall give notice of the times and places of their meeting, and of time limited to creditors to present their claims, by posting a notice thereof in four public places in the same county, and by publishing the same for at least four weeks successively in some newspaper printedin this State, or in any other manner that the court may direct.

Section 5897. The commissioners shall be sworn to the faithful discharge of their duties, and any one of them shall be authorized to administer oaths to parties and witnesses, when the same shall be required or proper, for the investigation and trial of questions before them.

Section 5898. At the expiration of the time lim-

ited, or as soon thereafter as they shall have time to complete the hearing of the claims presented, the commissioners shall make a report of their doings to the probate court, embracing lists of the claims presented, or exhibited in offset, and stating how much was allowed, and how much disallowed, together with the final balance, whether in favor of the creditor or the estate; and the report shall particularly state the manner of giving notice to claimants.

Section 5899. The commissioners shall have power to try and decide upon all claims which by law survive against or in favor of executors and administrators, except claims for the possession or title of real estate; and may examine and allow all demands at their then present value, which may be payable at a future day, including claims payable in specific articles, and may offset such demands in the same manner in favor of the estate.

Section 5907. Any executor, administrator or creditor may appeal from the decision and report of the commissioners to the Circuit Court for the same county, if application for such appeal be made in writing, filed in the probate office within sixty days after the returning of the report of the commissioners.

Section 5908 provides for bond to be given on appeal by a claimant against the estate. Section 5909 provides that no appeal shall be allowed where the amount involved does not exceed twenty dollars.

Section 5910 provides for notice of appeal and hearing.

Section 5911. The party appealing shall procure and file in the circuit court to which the appeal is taken, at or before the next term of such court,

after the appeal is allowed, a certified copy of the record of the allowance or disallowance appealed from, of the application for the appeal and the allowance of the same, together with the proper evidence that notice has been given to the adverse party, according to the order of the probate court.

Section 5912. When such certified copy shall have been filed in the circuit court, such court shall proceed to the trial and determination of the same according to the rules of law, allowing a trial by jury of all questions of fact in cases where such trial may be proper; and such court may direct an issue to be made up between the parties in a brief form when it shall be deemed necessary; and questions of law may be carried to the Supreme Court, and costs may be allowed or denied, in the discretion of the court.

Section 5913. The final decision and judgment in cases so appealed shall be certified by the circuit court or supreme court, as the case may be, to the probate court; and the same proceedings shall be had thereon as if such decision had been reported by the commissioners.

Br Record 8

Such being the provisions of law in force at the time, the probate judge of Ionia county, on the 30th day of June, 1877, appointed two commissioners to receive, examine and adjust all claims against the estate of Warren A. Sherwood, which commissioners took the oath required by the statute on the 15th day of August, 1877, and gave notice of their meetings at the office of Seneca Woolford, one of the commissioners, in the village of Hubbardston, in said county, and the claim of the plaintiff in error was disallowed entirely, the amount of the claim being three thousand two hundred fifty-seven dol-

Br Rec p 7

lars and sixty-one cents ($3,257.61). T
report in the probate court on th
March, 1878, and on the 28th of Marc
ing the claimant made application
to the circuit court of Ionia county,
their appeal, and gave the requisite
July 1, 1878, the appearance of the
entered. On the 30th of April, 1879, Smith & Sessions, attorneys for the estate of Sherwood, and the attorney for claimant, stipulated for a continuance to another term.

It seems the case was continued from term to term without anything being done in the case until Vernon H. Smith, one of the attorneys for the estate, was elected judge of the Circuit Court for the county of Ionia, and hence disqualified to try the cause, and the same was, on the application of the attorney for the plaintiff in error, removed to the Circuit Court of Jackson county, that being the residence of the said attorney under the provisions of the statute. (Sections 6495, 6496, 6497, 6498, 6499, 6500 and 6501 of Howell's Statutes.)

Section 6499 provides as follows: "If any party, or the attorney or solicitor of record of any party, shall be a resident of any county in this State other than the county in which said suit or proceeding is pending, and the judge of the circuit of such other county shall not be disqualified to sit within the provisions of the first section (6495), the said suit or proceeding shall be transferred to the circuit court of the county in which the party, attorney, or solicitor, or one of them resides, unless the parties thereto shall, by stipulation, otherwise agree; and in case of such agreement the order on such transfer shall be in accordance therewith." It may

after the appeal is allowed, a certified copy of the record of the allowance or disallowance appealed from, of the application for the appeal and the allowance of the same, together with the proper evidence that notice has been given to the adverse party, according to the order of the probate court.

Section 5912. When such certified copy shall have been filed in the circuit court, such court shall proceed to the trial and determination of the same according to the rules of law, allowing a trial by jury of all questions of fact in cases where such trial may be proper; and such court may direct an issue to be made up between the parties in a brief form when it shall be deemed necessary; and questions of law may be carried to the Supreme Court, and costs may be allowed or denied, in the discretion of the court.

Section 5913. The final decision and judgment in cases so appealed shall be certified by the circuit court or supreme court, as the case may be, to the probate court; and the same proceedings shall be had thereon as if such decision had been reported by the commissioners.

Pr Record 8

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Pr Rec p 7

lars and sixty-one cents ($3,257.61). They filed their report in the probate court on the 21st day of March, 1878, and on the 28th of March next following the claimant made application for an appeal to the circuit court of Ionia county, and perfected their appeal, and gave the requisite notice, and on July 1, 1878, the appearance of the plaintiff was entered. On the 30th of April, 1879, Smith & Sessions, attorneys for the estate of Sherwood, and the attorney for claimant, stipulated for a continuance to another term.

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Br Rec p 15

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be remarked that Ionia is in the Western District of Michigan, and Jackson is in the Eastern District of Michigan.

The case being now pending in Jackson, an order was, on the 18th of April, 1883, made, that an issue be framed and formed for trial in the cause by requiring the claimant to file a statement in writing of his claim in this cause against the said estate and that he accompany the same with an account in writing, to wit, the particulars thereof. That the administrator of the estate within thirty days after such service of the statement of said claimant's claim as aforesaid, cause to be filed with the clerk and served on said claimant or his attorney his answer or denial of said claimant's claim, and any other matter or difference that he may claim to have against the claim of said claimant.

Thereupon, there was filed a statement of the claim in the nature of declaration by the attorney of claimant, and the administrator, William Reynolds, in behalf of the estate of Warren A. Sherwood, deceased, demanded a trial, and gave notice that on trial he would show that the writing on which plaintiff in error claimed was never signed by the said Sherwood, and a general denial of liability on the part of said estate in any amount whatever.

This was accompanied by an affidavit of Julia C. Russell that the note on which the claim is founded was not signed by her brother, the deceased. (See Printed Record, pages 16, 17, 18 and 19.)

At the September term of the Circuit Court of Jackson County, the plaintiff in error, being a citizen of Colorado, made an application for the removal of the cause to the United States Circuit Court for the Eastern District of Michigan, on the

ground of local prejudice under section 639, subdivision 3, of Statutes of United States, filed a bond which was approved, and the case transferred to that court. (Record pp 22,23)

On the 15th day of December, 1883, the attorney for the administrator, defendant in error, William Reynolds, filed a motion to remand the cause to Jackson Circuit Court, which was argued by Mr. Vernon H. Smith for the administrator, and by Mr. John D. Conley for Mr. Hess, before Judge Brown; but without giving any decision, it was ordered reargued before a full bench in March following. In March, before the Circuit Judge and the District Judge, without any further argument, the cause was ordered remanded, *the District Judge dissenting.*

From this order remanding the cause this writ of error is prosecuted, and the only assignment of error is, error in making the order remanding the cause to the State court.

BRIEF.

I. The Courts of the United States have jurisdiction over claims against the estates of deceased persons, notwithstanding the statutes of the State may prescribe a mode of proving them. The mode prescribed by the State is not exclusive.

Payne v. *Hook*, 7 Wallace, 425; *Union Bank* v. *Jolly's Administrators*, 18 Howard, 503; *Suydam* v. *Jones*, 14 Peters, 67.

Williams v. *Benedict*, 8 How. 107; *Fiske* v. *Gould*, 14 Chicago Legal News, 310.

Chewett v. *Moran*, 17 Fed. Rep. 820.

Southworth v. *Adams*, 9 Bissell C. C. 521.
Hartman v. *Fischbeck, Adm'r etc.*, 16 Chicago Legal News, 65.

Wherever a probate matter assumes in the State court the phase of a controversy, it may be removed into the Federal court.

Gaines v. *Fuentes*, 92 U. S. 10.
Ellis v. *Davis*, 109 U. S. 485, 497 and 498.

"The jurisdiction of courts of the United States over controversies between citizens of different States can not be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." Justice Campbell in *Hyde* v. *Stone*, 20 How., 170–175.

"If the State legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to these courts." *Barrow* v. *Hunton*, 99 U. S. 85.

See further:

Davis v. *James*, 10 Bissell Cir. C. 51.
Sullivan v. *Andoe*, 4 Hughes C. C. 290.
Clapp v. *Dittman*, 18 Reporter, 423.
Frazier v. *Colrod, &c., Co.*, 2 McCrary C. C. 11.
Railway Co. v. *Whiten*, 13 Wallace, 270, 287.
Dennick v. *Railroad Co.*, 103 U. S. 11.

It is not claimed that the Federal court can issue execution to satisfy the judgment, but it may take jurisdiction to judicially ascertain the claim of plaintiff in error, leaving it to him after it has been certified, to follow the course of the State laws in that respect.

See *Yonley* v. *Lavender*, 21 Wallace, p. 276, cited with approval in *Kittredge* v. *Race*, 92 U. S. 116, 121.

II. There had been no trial within the meaning of the statute concerning removals. The proceeding before the commissioners was not a trial. The commissioners, under the laws of Michigan are not a court.

Sherburn v. *Hooper*, 40 Mich. 503.
Streeter v. *Paton*, 7 Mich. 346.

At the most the commissioners are but a committee of claims as to the particular estate. They have none of the attributes of a court. They have no seal, no continuous existence or general jurisdiction; they are limited in their action to the particular estate; no clerk, no record, they are in fact a special tribunal over which, indeed, after appointment, the probate court has no control, and is for most purposes independent of the probate court.

Their proceedings will not be stayed or affected by the pendency of an appeal from the order appointing the administrator of the same estate.

Lothrop v. *Conley*, 39 Mich. 757.
Streeter v. *Paton*, 7 Mich. 347.

The proceeding is at most a *tentative proceeding* to test the question whether there ever will be controversy calling for the action of a court where the forms of trial are observed; the preliminary step necessary to be taken before a trial upon *some issue* can be had.

This tribunal does not, then, constitute a court within the meaning of section 639. It would be absurd to offer to these commissioners good and sufficient surety for his entering in the Circuit Court of the United States for that district, copies of proc-

ess against him, etc., as required by this section of the Revised Statutes of the United States. The brief period of their existence would have ended before any decision as to the removability of the proceeding commenced before them.

But this mode of examining and allowing claims against estates is not the only one provided by the statutes of Michigan. By section 5903 of Howell's Statutes it is provided that "all actions and suits which may be pending against a deceased person at the time of his death, may, if the cause of action survives, be prosecuted to final judgment, and the administrator may be admitted to defend the same; and if judgment shall be rendered against the executor or administrator, the court rendering the sam eshall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate."

So by section following 5904 executors and administrators may bring suits against other persons, and by the following section 5906 "in such case the defendant may set off any claim he may have against the deceased, instead of presenting it to the commissioners, * * * * and if final judgment shall be rendered in favor of the defendant, the *same shall be certified by the court* rendering it to the probate court, and the judgment shall be considered the true balance."

By section 5946 it is provided, "If the appointment of commissioners to allow claims shall in any case be omitted, the judge of probate shall perform the duties devolving upon such commissioners by law, and no person shall thereby be prevented from prosecuting the same against the executor, admin-

istrator, heirs, devisees and legatees as provided by law."

By the following section, 5947, it is provided, "except in the cases before enumerated no action shall be prosecuted against any administrator; nor shall any writ of attachment or execution issue against the estate of the deceased in his hands during the time allowed him for the payment of debts, except in the case provided in the preceding section."

Still it must be held that a citizen of another State *must, where commissioners are appointed, commence then*, before the commissioners. But when the case assumes the phase of a controversy or suit for the first time in the course of the proceeding, will it be held that he shall not have any right to have his case heard by a Federal court though he might bring his suit originally there and get its judgment, which has the effect of the ascertainment of his claim in a court proceeding according to the course of the common law? This is not consistent with the long course of adjudications in this court and in the circuit courts.

It could not be determined that there would be any controversy over the matter of a claim which had been once passed upon in the probate court of another State, the presumption being that it would not be contested and hence no "controversy" arise in the matter.

It has been held that a case could not be removed from a justice of the peace into the Federal court, because that was not a "State court," within the meaning of the act of Congress.

Rathbone Oil Co. v. *Rauch*, 5 West Va. 79.

How much less should this special tribunal be considered a court within the meaning of the statute.

Fuller v. *County of Colfax*, 14 Fed. Reporter, 177.

Boom Co. v. *Patterson*, 98 U. S. 403, 406 and 407, seems to us decisive of this point.

In *Thorne* v. *Towanda Towing Co.*, decided in U. S. Circuit Court for the Western District of Pennsylvania, Dec. 30, 1882, and reported in Vol. 15 of Reporter, p. 549, the judge, Acheson, *held*, that where a cause before being put at issue has been referred to arbitrators under the compulsory arbitration law of Pennsylvania, and appeal has been taken from the award of the arbitrators, the cause may still be removed to the Federal court. He asks, "Was the proceeding before the arbitrators a 'trial' within the meaning of the act? I think not. The act, it seems to me, contemplates a trial in court, or at least a judicial trial of a binding nature. But under the Pennsylvania statute a trial before arbitrators, under a compulsory rule, is in the first place out of court (Tr. & H. Pract., Sec. 2231) * * * * the effect of the commitment to arbitrators is to deprive the court temporarily of jurisdiction to try the cause.

Camp v. *Bank*, 10 Watts, 130.

Again, the award is conclusive only by mutual acquiescence of the parties. Either side may appeal. Surely a procedure so anomalous, so barren of results, is not a trial within the purview of the act of Congress. That the rule of reference was entered by the plaintiffs is, I think, an immaterial circumstance."

That in this case the plaintiff presented his claim

to the commissioners is an immaterial circumstance.

The report of the commissioners on the claims examined is simply for the information of the probate court. The probate court does not review these claims or the doings of the commissioners in any way. No appeal lies from the commissioners to that court.

Holbrook v. *Cook*, 5 Mich. 229.

The first issue in probate cases is after the case is appealed, and while the Supreme Court of Michigan have held that there is no necessity for pleadings in the circuit court on appeal, there is where an issue can first be made, and may be by the court (as was done in this case) required of the parties. (Printed Record, page 16). See Section 5912, Howell's Statutes, before quoted (4 p. of brief). This court is the first place where a jury trial can be had, though by the Constitution of the State of Michigan, Sec. 27 of Article VI, Howell's Statutes, Vol. I p. 54, "the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law."

No jury is provided in proceedings before these commissioners, nor in fact in the probate court at all.

It is significant that in providing for appeals from the decision and report of these commissioners that the minimum claim upon which appeals may be taken is placed at twenty dollars; for, while this court has held repeatedly that the provisions of the VIIth Amendment of the Constitution of the United States does not apply to trials in State courts, the statutes of several States have fixed the minimum

of claim from which appeal may be taken to a higher court at this amount, especially where in the higher court on a trial *de novo* a jury may be demanded. It seems as if there was general concurrence of belief that in matters where, according to the course of the common law a trial by jury could be had, it shall *always* be *granted* where amounts in excess of this sum are involved, where the higher court may try it by a jury *de novo*.

In addition to the provisions of the section previously in the statement of the case set out, viz., Section 5912, it is further provided by Section 7550 "All issues of fact joined in any court proceeding according to the course of the common law, shall be tried by jury, except in those cases where a reference shall be ordered, or where the parties agree upon a case, and submit the facts to the court, or where the parties agree in writing to dispense with a jury."

This is not an appeal from an "order, sentence, decree or denial of a judge of probate" within the provisions of Sect. 6779.

In such cases by Sect. 6789 "the circuit court may reverse or affirm, in whole or in part, the sentence or act appealed from, and may make such order or decree thereon as the judge of probate court ought to have made, and may remit the case to the probate court for further proceedings, or may take any other order therein as law and justice shall require."

This case is certainly not governed by these provisions. The circuit court is not acting in this case as a reviewing court; it is simply only affording the claimant the right of a trial by jury in a civil case. A judgment in the common law form was by the court in *La Roe* v. *Freeland, held not to be erroneous in*

law, but liable to misapprehension, inasmuch it could not be literally enforced according to its terms. See case 8 Mich. 531, 534.

III. This case is not a *part of case in the* meaning that a bankruptcy case is an entire thing. The appeal separates this from the other claims as one for a contest in a superior tribunal—*in a court*—and this is the only thing determined.

The appeal brought up nothing except the particular claim appealed. *Lothrop* v. *Conley*, 39 Mich. 757.

IV. The fact that there is no provision for a judgment at law is no objection to the jurisdiction of the Federal court. The Federal court will be governed in its determination as to procedure by the provisions of the State law. In this case, for example, it would try this case precisely as the Circuit Court for Jackson county would have tried it, allowing a trial by jury and "proceeding according to the course of the common law," and would, if the *claimant*, plaintiff in error, was successful, certify the judgment to the Probate Court of Ionia county just as the State court would have done.

> *Ex parte McNeil*, 13 Wal. 243; *Whitton* v. *Railway Co.* 13 Wal. 270; *Denick* v. *Railroad Co.* 103 U. S. 11.
>
> *Ex parte Boyd*, 105 U. S. 647; *Kitredge* v. *Race*, 92 U. S. 116, 121.

V. The case was transferred to the proper court under the act concerning removals. The case was properly transferred from the Ionia Circuit Court to the Jackson Circuit Court, and was pending in the court for Jackson county at the time of the filing of the petition for removal, and could of course be on-

ly removed to the Circuit Court for the Eastern District of Michigan.

That the change of venue from Ionia to Jackson was properly taken is not questioned. Section 6499 heretofore set forth, expressly provides for this.

Fraser v. Luper Circuit Judge, 48 Mich. 176.

It may be here said that the U. S. Circuit Court for the Eastern District of Michigan, in a case coming from the Jackson Circuit Court, while Judge Emmons was on the bench, held this class of cases removable. The case is styled [illegible] ; decided in 18[illegible], but not reported.

Respectfully submitted.

HENRY NEWBEGIN, and
B. B. KINGSBURY,
Attorneys for Plaintiff in Error.

113-78

SUPREME COURT U. S.
FILED
DEC 8 1884
JAMES H. McKENNEY
CLERK

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D 1884.

CHARLES E. HESS,
Plaintiff in Error.

vs.

WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, deceased.
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

EDGAR M. MARBLE,
Attorney for Wm. Reynolds, Administrator of the Estate of Warren A. Sherwood.

IONIA, MICH.,
STANDARD PRINTING HOUSE,
1884.

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D 1884.

CHARLES E. HESS,
Plaintiff in Error.

vs.

WILLIAM REYNOLDS, Administrator of the Estate of Warren A. Sherwood, deceased.
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

In 1878, Charles E. Hess presented a claim against the estate of Warren A. Sherwood, deceased, to the commissioners appointed by the judge of probate of Ionia county, Michigan, to examine and adjust claims against said estate. The claim was disallowed. Afterwards in 1878, he appealed to the circuit court of Ionia county.

The appeal was pending in the circuit court for Ionia county, Mich., until in March, 1883. Without being brought to hearing, then the claimant obtained an order from the circuit judge of Jackson county in said state, transferring the case to that county for trial. Ionia county is in the western district of Michigan, and Jackson county in the eastern. In September of the same year (1883) less than six months after the transfer to Jackson county, the claimant made an affidavit that he had reason to believe and did believe that from prejudice and local influence he would not be able to obtain justice in said state court. Thereupon an *ex parte* order was made transferring the cause to the circuit court of the United States for the eastern district of Michigan.

Upon motion made in said circuit court after argument before both Judge Baxter and Judge Brown, the claim was remanded to the circuit court of Jackson county for trial. This order the claimant seeks to have vacated.

We submit that the order is correct and should stand.

1st. The proceeding to obtain payment of a claim against an estate is a proceeding in the settlement of an estate, and exclusively within the jurisdiction of the state courts. A judgment against the administrator or the estate is not correct.

Laroe vs. Freeland, 8 Mich. 531.

Under the statutes of the state of Michigan, no process can issue from the state court to collect the claim,

but the determination of the state court is certified to the probate court, and claims paid upon the basis of the allowance made. Its utmost effect therefore is to modify the list and amount of claims, and regulate the account of the probate court.

See Howell's Statutes of Mich., §§ 5913, 5922, 5924 and 5925.

Hence we say that the adjustment of each claim presented is but an incident in the settlement of the estate, and not in any true sense a suit between two parties, and it is only such a suit that can be removed.

See West vs. Aurora City, 6 Wall 139, 142.
Duvivier vs. Hopkins, 116 Mass. 128.

This removal is sought under section 639, subdivision 3 of the revised statutes of the United States, and that contemplates the removal only of *a suit between a citizen of one state and a citizen of another state.*

In Duvivier vs. Hopkins, 116 Mass. 128, the opinion being by Chief Justice Gray, it is said "a claim against an "insolvent estate is not such a suit," and the reasons are there clearly given.

2d. When a case is legally removed to the circuit court of the United States, the jurisdiction of the state court ceases, and the suit is thenceforth to proceed to trial, judgment and execution, and cannot afterwards be remanded to the state court for any purpose.

See Kanouse vs. Martin, 15 How. 193.
Insurance Co. vs. Dunn, 19 Wall. 214.
Mahone vs. Railroad Co., 111 Mass. 92.
Partridge vs. Insurance Co., 15 Wall. 573.
Duvivier vs. Hopkins, 116 Mass. 124.

If this last proposition is law, then clearly the matter or claim is not subject to removal, as the United States court could not enforce its final determination or conclusion in this case. Inasmuch as the final determination as to this claim must be modified and controlled by the determination of the commissioners appointed, or the probate court as to other claims.

There is therefore no way in which the judgment of the Circuit Court of the United States can be legally carried into execution.

If the United States court was an appellate tribunal from the state courts, of course the reason would fail, but it is not, but is a court of co-ordinate and independent jurisdiction.

3d. If the matter was ever removable, it was not when the petition was filed in the circuit court for Jackson county and the order made transferring it. The application was too late. The section under which they seek to remove it, provides that the petition must be filed *at any time before the trial or final hearing of the suit.*

U. S. Revised Statute, Section 639, subdivision 3.

The application must be made before the appeal to the circuit court.

Under the laws of Michigan, the probate court appoints commissioners to examine and adjust claims presented against the estate, and upon the report being made, the probate court proceeds to divide the estate or

pay the claims in part or entire as the condition of the estate will warrant.

Howell's Statutes of Michigan, Sections 5888, 5889 to Section 5906. Sections 5907 and sections following provide for appeals; Section 5913 provides for certifying back to Probate Court.

All claims must be presented to the commissioners, (see statutes referred to above) and the commissioners under the decisions in Michigan are an independent tribunal, and act judicially, and their decision is as final as the judgment of a court of record if not appealed from.

Streeter vs. Paton, 7 Mich. 346.
Fish vs. Morse, 8 Mich. 34.
Clark vs. Davis, 32 Mich. 157.
Shuburn vs. Hooper, 40 Mich. 505,
Duvivier vs. Hopkins, 116 Mass. 128.

If the commissioners before whom the claim must be presented, had original jurisdiction of the claim (and how can there be a question as to that) then the case of Stevenson vs. Williams, 19 Wall 572, is decisive of this question. For in that case the court through Mr. Justice Field, referring to the same language used in the statute under which this removal is sought, to-wit: "before the final hearing or trial of the suit" says, "*This clearly means before final judgment in the court of original jurisdiction where the suit is brought.*"

Clearly the claimant cannot say that the commissioners did not have original jurisdictiou of this claim. He has presented his claim for allowance to them; he has invoked their jurisdiction. They constitute the tribunal to whom the claims must be presented. They act

judicially. They have passed upon this claim, and it seems, according to the case of Stevenson vs. Williams just cited, the application for removal is too late.

Can the claimant be allowed to present his claim to one tribunal, and when that decides adversely remove it to another court, not an appellate one, but an entirely independent tribunal. The application must be before the final hearing before the commissioners.

In addition to the cases cited see

Low vs. Williams, 94 U. S. 650.

4th. But the precise point involved in this cause has been decided, and it seems is not an open question.

In August, 1878, in the United States Circuit Court for E. D. of Michigan, the question was as to the removal of the matter of the probate of the will of A. D. Frazer. The probate court had made a decree admitting the will to probate, from which the contestants appealed.

Judge Swayne in deciding the case said: "Aside from other objections, the application for removal was too late. It should have been made before the decree of the probate court wat entered and the appeal taken to the higher state court. Thereafter the right of removal was at an end; the delay was fatal. Such an application cannot be made to an appellate court, and he cites,

19 Wall 572.
21 Wall 41.
94 U. S. 650.

The report of this decision by Judge Swayne, I find in the 18th vol. of the All Law Jour. top paging 353.

In the case at bar the case was not only removed by appeal to an appellate court July 1, 1878, more than six years since, but on application of the claimant it was transferred from the court appealed to, the circuit court for Ionia county, to another circuit court.

The case is clearly within the language of Judge Swayne. The application for removal is to an appellate court, not the court or tribunal of original jurisdiction.

Hence we submit that the authorities cited settle the question involved, and hold that the application for removal was made too late.

See also Gaines vs. Feuntes, 92 U. S. 10.
Broderick's Will, 21 Wall 504.
Yonley vs. Lavender, 21 Wall 276.
Tarver vs. Tarver, 9 Peters 174.
Fonvergne vs. City of Orleans, 18 How. 470; 22 How 473, 478.

And we would call the attention of the court particularly to the case before cited of Duvivier vs. Hopkins, 116 Mass. 125 to 129, in which Chief Justice Gray, then of that court, thoroughly discusses the precise question involved in this case, and cites many authorities, and gives several reasons why a claim presented for allowance to commissioners on an estate of a deceased person, is not removable to the United States court.

The statutes of the two states Massachusetts and Michigan are substantially alike on the subject of claims, as will be shown by reference to the sections we have cited and those referred to in 116 Mass. 125.

In the case of Dickinson vs. Seaver, 44 Mich. 629, our own supreme court says: "Under our probate "system, estates must be settled in the probate court " and claims must be proved there."

point two or more suitable persons to be Commissioners to receive, examine and adjust all claims and demands of all persons against the deceased. * * *

Section 5889. When such Commissioners shall be appointed, it shall be their duty to appoint convenient times and places, when and where they will meet, for the purpose of examining and allowing the claims. * * * * *

Section 5907. Any executor, administrator or creditor may appeal from the decision and report of the Commissioners to the Circuit Court of the same county, if application for such appeal be made in writing, filed in the Probate office within sixty days after the returning of the report of the Commissioners.

113-87

SUPREME COURT OF THE UNITED STATES.

No. 1094. October Term, 1884.

WILLIAM H. POLLEYS *et al.*, Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY.

EXTRACTS FROM TRANSCRIPT OF RECORD.

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678 Remembered, that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the tenth day of January, A. D. 1882, on the thirteenth day of the term, to wit, on the seventh day of February, A. D. 1882, present, Orasmus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassody, associate justices of said court, the following proceedings were had, *inter alia*, to wit:

THE BLACK RIVER IMPROVEMENT COMPANY, Appellant,

vs.

WILLIAM H. POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, William E. Polleys, and The La Crosse Booming and Transportation Company, Respondents.

Appeal from circuit court, La Crosse county, State of Wisconsin.

This cause came on to be heard on appeal from the judgment of the circuit court of La Crosse county, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of La Crosse county in this cause be, and the same is hereby, reversed, with costs, against the said respondents, taxed at the sum of four hundred and ninety-nine & $\frac{70}{100}$ dollars ($499.70), and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to enter judgment in accordance with the opinion of this court.

STATE OF WISCONSIN, } *Supreme Court*, } ss:

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court at Madison, this seventh day of February, A. D. 1882.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

Endorsed: State of Wisconsin, supreme court. The Black River Imp't Co., appellant, against William H. Polleys *et al.*, respondents. Remittitur. Filed May 12, 1882. Chas. Smith, clerk.

709 STATE OF WISCONSIN:

Circuit Court for La Crosse County.

THE BLACK RIVER IMPROVEMENT COMPANY, Plaintiff,

against

THE LA CROSSE BOOMING & TRANSPORTATION COMPANY, WILLIAM H. POLLEYS, WILLIAM E. POLLEYS, GEORGE CORNES, & BENJAMIN E. EDWARDS.

To M. P. WING & G. C. PRENTISS, Esqrs.,
Attorneys for said Defendants:

Please take notice that the plaintiff will apply to the court, at the court-house in the city of La Crosse, in said county, on the 18th day of May, 1882, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a judgment, to be signed and entered in the above-entitled action in accordance with the decision of the supreme court thereon.

Said motion will be based on the record and all the papers in said case certified to the supreme court on appeal, as remitted to and filed in this court on the 12th day of May, 1882, on the judgment of the supreme court thereto attached and also on file therewith, and on the certified copy of the decision of the supreme court in said action, now on file with the papers herein in this court.

Dated May 13th, 1882.

BURTON & WOODWARD,
Plaintiff's Attorneys.

710 [Endorsed:] La Crosse county. In circuit court. The Black River Improvement Company against The La Crosse Booming and Transportation Company *et al.* Notice of application for judg't on remittitur from supreme court. We acknowledge receipt of a copy of within notice, and waive all other & further notice of the application for judgment as therein mentioned, this 13th day of May, 1882. M. P. Wing & G. C. Prentiss, defendants' attorneys. Filed May 23, 1882. Chas. Smith, clerk of court. Burton & Woodward, plaintiff's attorneys.

711 & 712 STATE OF WISCONSIN:

Circuit Court for La Crosse County.

THE BLACK RIVER IMPROVEMENT COMPANY, Plaintiff,

against

THE LA CROSSE BOOMING AND TRANSPORTATION COMPANY, WILLIAM H. POLLEYS, WILLIAM E. POLLEYS, GEORGE CORNES, & BENJAMIN E. EDWARDS, Defendants.

This day came the parties, by their counsel, and on reading and filing the certified copy of the judgment and opinion of the supreme court of this State in this cause, whereby the judgment heretofore rendered in this action dissolving the injunction and dismissing the plaintiff's complaint, and for costs, in the sum of eight hundred dollars and seven cents, in favor of said defendants and against said plaintiffs, is reversed, and whereby this cause was remanded to this court to enter judgment herein, in accordance with said opinion of the supreme court, and having heard counsel for the said plaintiff and counsel for said defendants, now, on motion of Burton & Woodward, plaintiff's attorneys, it is considered, adjudged, and decreed that the said defendants, The La Crosse Booming and Transportation Company, William H. Polleys, William E. Polleys, George Cornes, and Benjamin E. Edwards, and each of them, their, and each of their, agents, employés, and servants, and the officers, agents, and servants of The La Crosse Booming and Transportation Company, be, and they are, and each of them is, hereby, enjoined and restrained from removing, cutting, destroying, injuring, or interfering with the levees, embankments, and dykes, and other im-

713 provements built, made, and maintained by the said plaintiff over and across lot three (3) in section fifteen (15), and lots six (6) and seven (7) in section twenty-two (22), in township number seventeen (17), in range eight (8), in the county of La Crosse, in said State, and from removing, destroying, or in any way interfering with all or any portion of the embankment or dam by which the said plaintiff closed up the slough or branch of Black river, called Black Snake, at the head thereof, and from in any way or manner interfering with or injuring any other of the improvements made and maintained by the said plaintiff under its said charter in Black river, within the limits therein specified, or the lakes at or near its mouth; and that they, and each of them, do absolutely desist and refrain from in any way or manner drawing or diverting through the cut or sluiceway mentioned in the complaint in this action made, created, and maintained by them, and situated on the west bank of said Black river, in section twenty-two, in the town and range last aforesaid, and a short distance above the head of said Black Snake branch or slough of said river, any part of the waters of Black river, and from exercising, or attempting to exercise, any control over or interference with said cut or sluiceway, or the dyke or embankment on and along the west side of said Black river above the said head of Black Snake branch or slough, which will draw and divert, or

tend to draw and divert, the waters of Black river through the same.

And it is further considered, adjudged, and decreed that the said defendants, their, and each of their, agents, servants, officers, and employés, be, and they are, and each of them is, hereby,
714 enjoined and restrained from digging or excavating any canal, or digging out any slough, pond, bottom lands, or land lying or intervening between the main channel of Black river, in La Crosse county, and the Mississippi river, with a view, purpose, or intent of constructing or creating any continuous channel for the purpose of turning or diverting, or which may have the effect to turn or divert, any portion of the waters of said Black river, or of said Black Snake branch, slough, or chute, into French slough or French lake; and that the said defendants, and each of their officers, agents, servants, and employés, be, and they are hereby, enjoined and restrained, until the expiration of the said plaintiff's charter, from improving, or attempting to improve, the navigation of Black river, or of the lakes near the mouth of the same, in the counties of Clark, Jackson, Trempealeau, and La Crosse, as they existed on the 23rd day of February, A. D. 1864, by removing obstructions, building dams, breaking jams, deepening, widening, or straightening the channel, closing up chutes or side cuts leading from said Black river into the Mississippi river, or into the bottom lands thereof, or into sloughs, and from erecting booms or piers therein or thereon, and from constructing levees or dykes on or along the same, and from straightening the banks of said Black river, and from running, driving, or passing logs, lumber, or other materials through the aforesaid cut or sluiceway, and through its or their alleged improvements, down said Black Snake branch, slough, chute, or channel, along the west side of French island, into French lake or French slough and the Mississippi river; but they, and each of them, shall and may be at liberty for their own purposes to maintain sorting and rafting works in the Black river opposite to its or their lands
715 in such manner that they do and shall not interfere in any way with the works or improvements of the plaintiff, or the proper and reasonable use of the same, and shall and may be at liberty to excavate in front of its or their lands on Rice lake for the purpose of aiding in rafting logs, or for any other lawful purpose which does not and shall not interfere with the works or improvements of the plaintiff, or the proper and reasonable use thereof.

And it is further considered, adjudged, and decreed that the said defendants, and each of them, their, and each of their, officers, agents, servants, and employés, be, and they are hereby, enjoined and restrained, during the continuance of the charter of the said plaintiff, from exacting or collecting any tolls or charges for any logs, lumber, timber, or other material driven down upon or boomed along the waters of Black river, or any of its channels or side cuts, or upon the lakes near the mouth of the same, within the counties of Clark, Jackson, Trempealeau, and La Crosse, as their boundaries existed on the 23rd day of February, A. D. 1864, and from in any way or manner diverting logs, timber, lumber, or other materials

being floated or driven down said river and destined for the waters of the Mississippi river, from passing to and arriving at the booms of the plaintiff at Onalaska, on said Black river, near its mouth.

And it is considered and adjudged that the Black River Improvement Company, the said plaintiff, recover against the La Crosse Booming and Transportation Company, William H. Polleys, William E. Polleys, George Cornes, and Benjamin E. Edwards, the said defendants, the sum of one thousand eighty-eight dollars and ninety-seven cents, for its costs and disbursements in this action, and that execution issue therefor.

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Dated May 24th, A. D. 1882.

By the court:

A. W. NEWMAN, *Judge.*

[Endorsed:] Circuit Court, La Crosse County. Black River Improvement Company *vs.* La Crosse Booming & Transportation Co. *et al.* Judgment. Filed May 24, 1882. Chas. Smith, clerk of the court.

Judgment Docket.

STATE OF WISCONSIN:

Circuit Court, La Crosse County.

Names of persons against whom judgment is rendered: William H. Polleys, William E. Polleys, George Cornes, Benjamin E. Edwards, & The La Crosse Booming & Transportation Company.

Names of persons in whose favor judgment is rendered: The Black River Improvement Company.

Date of judgment: May 24th, 1882.

Damages and costs: $1,088.97.

Time of docketing judgment: Judgment docketed May 29th, 1884, at 5¼ o'clock p. m.

Names of attorneys of the persons in whose favor judgmant is rendered: Burton & Woodward.

STATE OF WISCONSIN, *ss:*

Circuit Court, La Crosse County.

I, Charles Smith, clerk of said court, do hereby certify that I have compared the foregoing with the original "docket," now of record in my office, and that it is a correct transcript therefrom and of the whole thereof, in a certain action wherein The Black River Improvement Company is plaintiff and William H. Polleys *et al.* are defendant-.

Damages----	$
Costs -------	$1,088 97
Total ---	$

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the court-house in the city of La Crosse, this first day of October, A. D. 1884.

[SEAL.]

CHARLES SMITH, *Clerk.*

Entry: Execution issued January 15th, 1883, and returned satisfied March 19th, 1883.

CHAS. SMITH, *Clerk.*

Petition.

To the honorable the presiding judge of the circuit court for La Crosse county, State of Wisconsin:

And now come William H. Polleys, George Cornes, Benjamin E. Edwards, William E. Polleys, and La Crosse Booming & Transportation Company, of the county of La Crosse and State of Wisconsin, by M. P. Wing & Guy C. Prentiss, their attorneys, and complain that in the record of proceedings and also in the rendition of judgment in a suit between the Black River Improvement Company, plaintiff, and William H. Polleys, George Cornes, Benjamin E. Edwards, William E. Polleys, and La Crosse Booming & Transportation Company, defendants, in the circuit court of the State of Wisconsin for the county of La Crosse, being the highest court of law of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on the 29th day of May, A. D. 1882, in said suit, wherein the said plaintiff brought its action to establish its right to maintain a dam across and totally obstruct a navigable river in the said State of Wisconsin, the waters whereof flow into the Mississippi river, and to enjoin the said defendants from exercising their rights under the laws of the United States in using and navigating the channel of the said navigable river in and about the prosecution of their business in manufacturing and shipping lumber to market in the States bordering on the said Mississippi river, all of which appears in the record of proceedings, manifest error hath happened to the great damage of the said above-named defendants.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

M. P. WING & G. C. PRENTISS,
Attorneys for said William H. Polleys, George Cornes, Benjamin E. Edwards, William E. Polleys, & La Crosse Booming & Transportation Company.

I. C. SLOAN, *Of Counsel.*

Allowed May tenth, A. D. 1884.

A. W. NEWMAN,
Presiding Judge of the Circuit Court for La Crosse County.

The writ of error allowed this 17th day of May, 1884.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

[Endorsed:] Filed May 29, 1884. Chas. Smith, clerk of court.

Bond.

STATE OF WISCONSIN:

Circuit Court for the County of La Crosse.

BLACK RIVER IMPROVEMENT COMPANY, Plaintiff,

against

WILLIAM H. POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, William E. Polleys, & La Crosse Booming & Transportation Company, Defendants.

Know all men by these presents, that we, William H. Polleys, Benj'n E. Edwards, and William E. Polleys, as principals, and Charles B. Solberg and Herman Berger, as sureties, of the county of La Crosse and State of Wisconsin, are held and firmly bound unto the Black River Improvement Company in the sum of two thousand dollars, to be paid to the said The Black River Improvement Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seal; dated this tenth day of May, A. D. 1884.

Whereas the above-named William H. Polleys, George Cornes, Benjamin E. Edwards, William E. Polleys, & La Crosse Booming & Transportation Company have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the State of Wisconsin for La Crosse county:

Now, therefore, the condition of the above obligation is such, that if the abeve-named defendants shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

WM. H. POLLEYS. [SEAL.]
B. E. EDWARDS. [SEAL.]
W. E. POLLEYS. [SEAL.]
CHAS. B. SOLBERG. [SEAL.]
HERMAN BERGER. [SEAL.]

Sealed and delivered in presence of—
H. STAKHAUS.
M. P. WING.

UNITED STATES OF AMERICA, } ss:
La Crosse County, State of Wisconsin, }

Herman Berger and Charles B. Solberg, being duly sworn, depose and say, and each for himself says: That he is worth the sum of two thousand dollars over and above his just debts, liabilities, and exemptions.

HERMAN BERGER.
CHAS. B. SOLBERG.

Subscribed and sworn to before me, this 10th day of May, 1884.

M. P. WING,
Notary Public, La Crosse Co., Wis.

I approve the foregoing bond and sufficiency of the sureties thereto.

A. W. NEWMAN,
Circuit Judge.

I approve of this bond and the sufficiency of the sureties, May 17, 1884.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

[Endorsed:] Filed May 29, 1884. Chas. Smith, clerk.

Citation.

UNITED STATES OF AMERICA, }
State of Wisconsin, } *ss:*

To the Black River Improvement Company:

You are hereby cited and admonished to appear at the Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court for La Crosse county, in the State of Wisconsin, wherein William H. Polleys, George Cornes, Benjamin E. Edwards, William E. Polleys, and La Crosse Booming and Transportation Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done in that behalf.

Witness Hon. Alfred W. Newman, presiding judge of the circuit court for La Crosse county, State of Wisconsin, this tenth day of May, A. D. 1884.

A. W. NEWMAN,
Presiding Judge of the Circuit Court
for the County of La Crosse, State of Wisconsin.
ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

[Endorsed:] Filed May 29th, 1884. Chas. Smith, clerk of court.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of La Crosse county, State of Wisconsin, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea, which is in the said circuit court for the county of La Crosse, State of Wisconsin, before you, being the highest court of law in said State in which a decision could be had in the said suit between The Black River Improvement Company, plaintiff,

and William H. Polleys, George Cornes, Benjamin E. Edwards, William E. Polleys, and La Crosse Booming and Transportation Company, defendants, wherein was drawn in question the construction of statutes of the United States, and the said decision was against the right & privilege set up and claimed by the said above-named defendants under such statutes of the United States, manifest error hath happened, to the great damage of the said above-named defendants, as by their complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, the tenth day of May, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] HARVEY J. PECK,
Clerk Circuit Court U. S., Western Dist. of Wis.

[Endorsed:] Circuit court U. S., western dist. of Wis. Black River Improvement Company against W. H. Polleys *et al.* Petition, bond, citation, and writ of error. Filed May 10th, 1884. H. J. Peck, clerk. Filed May 29, 1884. Chas. Smith, clerk of court.

UNITED STATES OF AMERICA:

In Supreme Court. Error from the Circuit Court for La Crosse County, State of Wisconsin.

WILLIAM H. POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, William E. Polleys, & La Crosse Booming and Transportation Company, Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY, Respondent & Defendant in Error.

Due service of the citation, writ of error, & notice in said action, admitted May 28, 1884. This admission may be attached to the original citation, writ of error, & original papers & copies, with the clerk's return therein.

BURTON & WOODWARD,
Att'ys for Respondent & Def't in Error.

[Endorsed:] Filed Oct. 2, 1884. Chas. Smith, clerk of court.

113-87

SUPREME COURT

OF THE UNITED STATES.

WILLIAM H POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, WILLIAM E. POLLEYS AND LA CROSSE BOOMING AND TRANSPORTATION COMPANY.

Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY.

Respondent.

Brief of Plaintiffs in error, on motion to dismiss or affirm.

M. P. WING &
I. C. SLOAN,
Counsel for Pltfs in error.

113-87

SUPREME COURT

OF THE UNITED STATES.

WILLIAM H. POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, WILLIAM E. POLLEYS AND LA CROSSE BOOMING AND TRANSPORTATION COMPANY.

Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY.

Respondent.

Brief of Plaintiffs in error, on motion to dismiss or affirm.

M. P. WING &
I. C. SLOAN,
Counsel for Pltfs in error.

Supreme Court of the United States.

WILLIAM H POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, WILLIAM E. POLLEYS AND LA CROSSE BOOMING AND TRANSPORTATION COMPANY.

Plaintiffs in Error.

vs.

THE BLACK RIVER IMPROVEMENT COMPANY.

Respondent.

Brief of Plaintiffs in error, on motion to dismiss or affirm.

The motion made by the defendant in error to dismiss the writ of error or affirm the judgment below is based upon three grounds which we shall answer in their order.

The first is, that the writ of error was not brought within two years after the entry of final judgement.

The following affidavit made by the clerk of the circuit court for La Crosse county which is filed in opposition to the motion states the facts as to the entry of the judgment and is as follows:

STATE OF WISCONSIN.

Circuit Court, La Crosse County.

JUDGMENT DOCKET.

Names of Persons against whom judgment is rendered.	William H. Polleys, William E. Polleys, George Cornes, Benjamin E. Edwards and the La Crosse Booming and Transportation Comp'y.
Names of Persons in whose favor Judgment is rendered.	The Black River Improvement Company.
Date of Judgment.	May 24th, 1882.
Damages and Costs.	$1,088.97.
Time of Docketing Judgment.	Judgment Docketed May 29, 1882, at 5¼ o'clock p. m.
Names of Attorneys of the Persons in whose favor Judgment is rendered.	Burton & Woodward.

STATE OF WISCONSIN,
Circuit Court.
La Crosse County. } ss.

I, Charles Smith, Clerk of said Court, do hereby certify that I have compared the foregoing with the original "Docket," now of record in my office, and that it is a

correct transcript therefrom and of the whole thereof, in a certain action wherein The Black River Improvement Company is plaintiff, and William H. Polleys et al, defendants.

Damages, $_____

Costs, $1,088.97.

Total, $_____

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at the Court House, in the city of La Crosse, this first day of October, A. D. 1884.

CHARLES SMITH, Clerk.

Entrys of execution issued January 15, 1883, and returned satisfied in full March 19, 1883.

CHARLES SMITH, Clerk.

Supreme Court of the United States.

ERROR TO THE CIRCUIT COURT FOR LA CROSSE COUNTY, WISCONSIN.

WILLIAM H. POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, WILLIAM E. POLLEYS, and LA CROSSE BOOMING and TRANSPORTATION COMPANY,
Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY,
Respondent and Defendant in Error.

STATE OF WISCONSIN, } ss.
COUNTY OF LA CROSSE. }

Charles Smith, being duly sworn, says that he is Clerk of the Circuit Court for La Crosse County, in the State

of Wisconsin, and was such Clerk during all the year 1882. That the final judgment in said action, which is dated at the bottom as of May 24, 1882, was not in fact entered or docketed until the twenty-ninth (29th) day of May, A. D. 1882. That said judgment was prepared by the attorneys for the defendant in error and presented to the Court and *filed*, as a matter of form, on the 24th day of May, 1882. That on the said 24th day of May, 1882, the plaintiffs in error who were the defendants in said original action, by their attorneys filed their objections, in writing, to said proposed judgment, to the matter and form thereof, which objections were argued before said Circuit Court for La Crosse County, which objections are on file in said Court and a part of the record in said action.

That under the laws of the State of Wisconsin and the rules and practice of this Court, said judgment could not be lawfully entered and docketed until the costs were taxed, which must be on three days' notice to the opposite party; that on the 26th day of May, 1882, notice of taxation of costs in said action was served by the plaintiffs' attorney, in said original action on the attorneys for the plaintiffs in error for the 29th day of May, 1882, and the costs of said action were taxed on said last named day and on the same day, and not before, the amount of costs taxed were inserted in the judgment, the judgment roll made up and the judgment docketed, as required by law.

That a certified transcript of the docket of said judgment is hereto attached and made part of this affidavit.

Subscribed and sworn to before me this 2d day of October, 1884. } CHARLES SMITH.

W. H. STOGDILL,
U. S. Court Commissioner,
Western District of Wisconsin.

It appears conclusively from this affidavit that the judgment was not entered until the 29th day of May 1882. Neither the date of the judgment nor time of filing fixes the time from which the two years begin to run. *It is the entry.* The supreme court decided in general terms what the judgment which was to be entered in pursuance of the opinion should be, and the order of the court remetting the record to the circuit court of La Crosse county, directed the latter court to *enter* judgment in pursuance of the opinion. (See brief of Deft. in err. fol. 108.) A glance at the judgment (Id. fol. 169) shows conclusively that it is the judgment of the circuit court and not of the supreme court.

The judgment as drawn by the attorneys for the deft. in err. was dated the 24th of May, but it was not settled what the judgment should be, and the costs were not taxed and inserted therein until the 29th day of May 1882. As the writ of error was duly lodged with the clerk of the court by which the judgment was entered on the 28th day of May, 1884, it was clearly prosecuted in time. From an over abundance of caution the writ of error was allowed both by the presiding judge of the circuit court and the chief justice of the supreme court.

Even if the judgement had been entered in the Supreme court, if the record had been transmitted to the circuit court, the writ of error would have been properly directed to the latter court, Downes vs. Scott 4 How. 502-3.

"The writ of error may be directed to any court in which the record and judgement on which it is to act may be found. And if the record has been remitted by the highest court or to another court, it may be brought by the writ of error from that court". Gelston vs. Hoyt, 3 Wheat, 246.

In Atherton *vs* Lawler 91 U. S. 146-7, it is held that the writ may be directed *to the court holding the record* and where, as in New York and Wisconsin, it is the practice

for the highest court after its decision, to send the record to the inferior court, the writ may be sent there.

In Commissioners *vs* Lucas 93 U. S. 108, it is held, when a judgment is "*reduced to form and entered*" it becomes the *final* judgment. The judgment in this court was "*reduced to form and entered*" in the circuit court for La Crosse county, the Supreme court (Deft. in err. brief fol. 108) directed the circuit court to *enter* judgment, which the latter court did on May 29, 1882; and the statute limits the time to sue out writ of error to two years from the time the judgment is *entered*.

In Green *vs* Van Buskirk 3 Wall, 450, it was held "a judgment cannot be regarded as *final* in the sense of the act until *entered* in a court from which execution can issue."

In the last case which is like the one at bar, the court further says:

"This was, it is true, the judgment of the court of appeals, *as well as the judgement of the supreme court.*"

But if we apply the test contained in the first quotation, that a judgment cannot be considered as *final* until entered in a court from which execution can issue. then it was the *final* judgment of the circuit court alone; for there can be no pretence that an execution could have issued on this judgment from the supreme court.

The question of *entering final decrees*, in equity cases in the Supreme court, was considered. (In Persons *vs* Merrick 5 Wis. 231, Reed *vs* Jones 8 Wis. 421, Boyd *vs* Sumner 10 Wis 41), in which the court admitting its power to enter final judgment lays down the rule that it will not in general exercise that power, although in the last case yielding to the request of the parties, under the peculiar circumstances of the case, it was allowed to be done.

These cases recognize clearly the distinction between *entering final* judgment in the supreme court and in the circuit court. When the supreme court declines to

enter final judgment, but directs the circuit court to do so, and remits the record to that court for that purpose, it becomes the judgement of the latter court, which, alone, can enforce its execution.

Stone *vs* Wisconsin 92 U. S. 181, is the case of a writ of error precisely like the one at bar.

II.

The second point made in the brief of deft in err. is that no federal questions were involved in the case, or if they were, they were not raised in the court below.

We insist that two federal questions are involved, and indeed that they are substantially the only questions in the case, viz;

1st. That a state has no power to authorize the total obstruction of the navigable rivers flowing into the Mississippi river in Wisconsin.

2d. That riparian rights in such navigable streams are property which is protected by the 1st Section of the 14th Amendment to the Constitution of the United States, and cannot be taken away without due process of law and compensation being made.

The facts of the case on which these questions arise are briefly these;

The defendant in error is a private corporation organized under Chapter 84 of the Laws of Wisconsin of 1864 and was in general terms authorized to improve the navigation of Black River, a navigable stream flowing into the Mississipbi river.

The plaintiff in error is a corporation organized under the general laws of the State in 1876, and under its articles of incorporation was also authorized to improve the navigation of the Black river and by way of Black Snake, to the Mississippi.

Black river from section 22 township 17 north, of range 8 west, is divided naturally into two channels which meet again in Rice Lake, in section 36, same township. The western of said branches is called the "Black

Snake" and before the enactment of said chapter 84 had been meandered and returned navigable by the United States surveyors, and is designated upon the government surveys as the Western branch of Black river, was, in fact, navigable for keel boats, rafts, logs and timber, and was the only navigable channel of Black river in low water at a very early day. That said Black Snake so continued to be navigable *and to be navigated* with rafts, logs, and timber until the defendant in error obstructed the same, (10th finding of fact).

The plaintiff's in error were the owners of the channel and banks of the Black Snake river.

The defendant in error had once totally obstructed the Black Snake channel which obstruction the defendants in error had removed.

The object of this action was to establish the right of the defendant in error to totally obstruct said last named channel.

We think the above brief statement of facts sufficient to show that a federal question is involved.

The first and third findings of fact of the circuit court (fol. 25 defts. in err. brief).

(1). "That the channel called the Black Snake is a part of Black river and is a public highway.

(3). That the owners (plffs. in err.) of the Black Snake channel have, as an incident to such ownership the right to have the waters of Black River flow past their lands as it was accustomed to flow. * * * * * * * *

The plaintiff (deft. in err.) had not and has not, the right to close up the Black Snake channel, nor to prevent the natural flow of water therein so as to destroy the rights of riparian owners upon that channel."

Present the federal questions as involved in the case:

1st. Has a State the right to authorize a private corporation to totally obstruct the navigable waters of a stream flowing into the Mississippi river?

The answer to this question depends upon the power of the state legislature over those navigable rivers

which Congress has declared to be national highways. Inasmuch as Congressional legislation has been confined to the northwestern territory and has not extend- to the eastern states, such cases as Wilson *vs* Black Bird Creek Co. 2 Pet. 245 and Gilman *vs* Philadelphia, 3 Wall. 712, have no bearing on the question.

In Cooley on Con. Lim. page 591, the true rule is stated:

"Wherever a river forms a highway upon which commerce is conducted with foreign nations, *or between States*, it must fall under control of congress under the power over commerce. The circumstance, however, that a stream is navigable and capable of being used for foreign or interstate commerce, does not exclude regulation by the State, if in fact Congress has not exercised its power in regard to it." Citing cases,*supra*.

So that we have only to inquire whether Congress has exercised its power over the Black river so as to withdraw the power of authorizing obstruction to its navigable waters from the State.

It should be borne in mind that the commerce carried on on the Black Snake river was essentially inter-state commerce; it passed to and from the Mississippi river and to and from the States bordering on that national highway.

So important was the unobstructed navigation of all navigable waters, flowing into the Mississippi river, deemed by the national Congress that in 1787, when territorial governments were first insituted, in the northwestern territory Congress provided in the articles of compact, included in that ordinance:

"That the navigable waters leading into the Mississippi * * * * shall be common highways and forever free as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

This provision if it continued in force after the or-

ganization of the state government of Wisconsin, would clearly prohibit the state from authorizing the total obstruction of the navigable water of a branch of the Black river.

But we do not propose to reopen the question as to whether this provision of the ordinance of 1787, continued in force after the organization of the state government.

We think it must strike any mind with surprise that it is claimed that the Supreme Court of the United States has decided, that if that provision were held to continue in force, the States carved out of the Northwestern Territory would not, after their admission, stand upon an equal footing with the older States. Surely such a statement could only originate in ignorance of the 13th Section of the Ordinance of 1787 where it is declared that:

"To fix and establish these principles as the basis of all laws, constitutions, and governments which forever hereafter shall be formed in said territory, to provide for the establishment of states and permanent government therein, and for their admission to share in the federal councils *on an equal footing with the original* States * * * * It is hereby ordained and declared * * that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory."

Then follows, among others, the article above quoted.

But the right of the plffs. in err. to have the Black Snake river remain unobstructed does not depend upon the ordinance of 1787.

In the act providing for the sale of land in the territory northwest of the Ohio river : C. 22 Sec. 9 Vol. 1 page 468 Stat. at Large, it was provided :

"That all navigable rivers within the territory to be disposed of * * shall be deemed to be and remain, public highways."

Also in the act "to enable the people of the Territory of Wisconsin to form a constitution and state government and for the admission of such into the union." Ap-

proved August 6th, 1846, Sec. 3, it was provided.

"And said river (the Mississippi) and waters and the navigable waters leading into the same, shall be common highways and forever free as well to the inhabitants of said State as to all other citizens of the United States without any tax, duty, or toll therefor."

The important question here presented is whether any force or effect whatever is to be given to this repeated legislation by Congress declaring the navigable rivers of Wisconsin, leading into the Mississippi river to be common highways as well to the inhabitants of said state as to all other citizens of the United states, or whether the state has still power to totally obstruct all such rivers within its limits. This question seems to depend upon the effect which is to be given to the admission of Wisconsin into the union. That is, whether such admission of its own force, *ipso facto*, abrogated all this legislation declaring such rivers highways or whether it continued in force for the protection of the rights of the inhabitants of the state and all other citizens of the United States in such navigable waters, after such admission.

If congress has exercised its constitutional right to keep such rivers open as highways, it will not be contended that the state can authorize their obstruction, nor that building dams across such rivers without locks or shutes, for the passage of water craft adapted to their navigation, is not a violation of said acts of congress (if still in force) nor such rivers thereby cease to be *highways*.

Notwithstanding the claim made by counsel for the deft. in err. that this court has settled this question by repeated decisions, we deny that the question was fairly presented in any case cited.

Pollards Lessee *vs* Hogan 3 How. 212 turned on the question whether the United States or the state owned the bed of navigable rivers in the state of Alabama.

Strader *vs* Graham 10 How. 82 turned on the ques-

tion of the effect of the ordinance of 1787 on the *statutes* of Slaves, and although in both cases the effect on the ordinance of 1787 of organizing state governments and admitting them into the union was discussed; yet the question in the case at bar was not considered. It is tacitly conceded in both cases that such portions of the ordinance as do not effect the *equality* of *constitutional right* and *power* of such new states with the original ones, might remain in force. Certain of the six articles of compact contained in the ordinance, if continued in force after the admission of a state organized in the teritory to which the ordinance applies, would obviously make such state inferior to the original states "in constitutional right and power." But this provision for protecting the navigation of rivers is not one of them Congress possesses the undisputed power to declare any and all the rivers in the original states or in any one or more of them to be national highways and thus prevent the states from obstructing them. It has failed to exercise this power in the older states, but it has exercised it in the northwestern territory and especially in the territory comprising the state of Wisconsin. Because this power had not been exercised by congress in the states of Delaware and Pennsylvania, the cases of Wilson *vs* Blackbird Creek Co. 2 Pet. 245 and Gilman *vs* Philadelphia 3 Wall. 713, have no application to the question here, where congress has exercised its power.

We call the attention of the court to the fact that in the enabling act supra, Congress selected from the ordinance of 1787 the provision declaring the navigable rivers in Wisconsin common highways and specially reenacted it, omitting such provisions of the ordinance as would derogate from the equality of Wisconsin with the older states.

Might not congress pass an operative act to thus protect the rivers of Wisconsin from obstruction by state legislation as well before as after the state was admitted into the union? Can it be held that such an act

is repealed, by implication, by the admission of the state into the union because it is repugnant to the soverignty of the state, when congress has the undoubted right to pass such an act the day after its admission. As well might it be claimed that the admission repealed, by implication, all the laws of congress relating to the survey and sale of the public lands in the state.

The cases of Pound *vs* Turck 95 U. S. 459 and Escanaba Co. *vs* Chicago 107 U. S. 683, are not in point, because in neither case was the public easement in the rivers destroyed or attempted to be, by a total obstruction thereof. The rights of pontage and of daming, on the part of the state for the purpose of promoting trade and commerce, is not inconsistent with maintaining the character of these rivers as common highways, whilst total obstruction destroys that character and is utterly inconsistent therewith.

In Wallamet Iron Bridge Co. *vs* Hatch, 19 Fed., Rep. 347, it is held:

"The act of February 14, 1859, admitting Oregon into the Union, which declares that the navigable waters therein shall be 'common highways and forever free to the citizens of the United States, is not a compact made with, or condition imposed upon, the State in consideration of its admission into the Union; but, is so far an absolute and valid regulation made by Congress in pursuance of its power over the navigable waters of the United States as a means of interstate and foreign commerce, which it might as well have enacted before, or after, as at, the time of such admission."

"Congress, by act of 1859, having declared the Wallamet River a common highway, the State cannot authorize any one to build a bridge across the same, which, under the circumstances of the case, will needlessly impede, or obstruct, the navigation thereof."

In Woodruff *vs.* N. B. Gravel Min. Co., 18 Fed., Rep. 786, it is held:

"The provision in the act of admission (California)

may not be valid as a mere compact between the United States and the new State, but it is valid as an act of Congress, passed by virtue of its constitutional power to regulate commerce among the States and with foreign nations and its authority to establish post roads. Pollards Lessees *vs.* Hogan, 3 How., 224, 225, 229, 230. In the Wheeling bridge case, as we have seen, the Court says: "The compact by the sanction of Congress *has become a law of the Union.* 13 How., 566."

We do not deem it incumbent on us to make an elaborate argument on a motion to dismiss or affirm, as we would on the argument of the case. If we show that there is a fairly debatable federal question, important in its consequences, as the one at the bar is, we think we have shown enough to have the case argued in its regular order on the merits.

We do not discuss the question as to the right of a State to authorize the obstruction of one of the navigable branches of a river, when it would not have the right to obstruct the whole river, because,in our view, the question is the same as to the power to obstruct the whole of the navigable rivers of the State, as to obstruct one, or a branch of one. It is a question of power between the Federal and State governments. It exists as to all the navigable waters of the State, or as to none of them.

If there is no federal law to prevent a State from granting to a private corporation authority, to totally obstruct the navigable rivers of a State for their own private gain and profit, there ought to be such a law. In the case at bar the defendant in error might as well have dammed up the eastern, or main, asthe western, channel. Indeed, so far as the volume of water flowing in each is concerned, they are nearly equal,--49.2 per cent. of thethe water flowing through the Black Snake--test of Matthew Tshirge, engineer.

III.

It is admitted by the Supreme Court that the

plaintiffs in error (brief, folio 76) owned lot 8, in Sec., 22, T. 17, R. 8 west, and that the levee or dam of defendant in error, which obstructed the Black Snake, was built on this lot without any legal proceedings to condemn and without compensation made or provided.

Although some proceedings were instituted to obtain by an exercise of the right of eminent domain, the privilege of erecting a levee or dam on the property of the plaintiffs in error, such proceedings were abandoned, and it must be conceded that lot 8 was used for that purpose without due process of law.

We here submit the question that the property rights of the defendants in thatlot, are protected by the first Section of the fourteenth Amendment to the Constitution of the United States.

"Nor shall any State deprive any person of life, liberty or property without due process of law."

It would hardly be respectful to this court to enter into an argument for the purpose of showing that an act of the legislature by which a person is deprived of his property is not due process of law or that entering upon a man's land and erecting a permanent dam or levee upon it is not depriving him of his property, and taking it within the ordinary meaning of these terms.

As to the scope and meaning of due process of law See opinion Hogan *vs* Reclamation Dist. 111 U. S. 707-8.

If this is so, then the defendants have the right to invoke the protection of this clause of the constitution of the United States.

We single out lot eight from among the others owned by the plff's. in err. for the reason that the title to this lot was derived from the United States and not from the state of Wisconsin and does not therefore fall within the rule laid down by the state court that there was granted, by implication, a right to occupy the lands owned by the state. Lot eight is situated between the two branches of Black river and the navigation of the western branch could not be obstructed without building a dam upon

this lot. See the testimony of D. J. Spaulding, Abraham Pettinger, Richard Fahey and Levi Withee, as the plff's in err. titles extended to the center of the channel.

IV.

The riparian rights of the plffs. in err. in the navigation of the western branch of Black river were property which the deft. in error could not deprive them of without due process of law, nor without making compensation; they were owners in fee of the banks and, under the Wisconsin rule, of the bed of the Black Snake channel, Olsen *vs* Merrill 42 Wis. 203. The law upon this subject is laid down in Yates *vs* Milwaukee, 10 Wall. 504 as follows:

"But whether the title of the owner of such lot extends beyond the dry lands or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among these rights are access to the navigable part of the river from the front of his lot * * * * * this riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Applying these principles to the case at bar, we ask by what right the plffs. in err., the owners of the banks and bed of the western branch of Black river, can be deprived of access to the navigable waters of that stream by an arbitrary act of the legislature, an embankment made upon their lands without compensation, and their property as riparian proprietors wholly destroyed.

We waive discussing the question here as to whether the grant by the legislature to the defft. in err. of the franchise to improve the Black river, was also by implication a grant to occupy by enbankments any lands then owned by the state for the reason that the plffs. in err.

owned lands to which the title had never been in the state, or in which the state had parted with its title before the act incorporating the deft. in err. was passed.

It is argued by the counsel for defft. in err. that these questions, or some of them, were not called to the attention of the state court until an argument for a rehearing was made; but it is obvious that all these questions were involved in the case, and could not be overlooked by any intelligent court. Aside from the forced and erroneous construction which the State court put upon the general language of the charter of the deft. in err. by which it was held that a right to dam chutes, sloughs and side cuts, authorized it also to dam up one of the navigable branches of the river, there were no other questions involved in the case.

Apply the rule adoped by this court in Susquehanna Boom Co. *vs* West B. Boom Co. 110 U. S. 58.

'If the judgments of the courts of the States are to be reviewed here on such (that is to say Federal) questions, it should only be when it appears unmistakably that the court either knew, *or ought to have known*, that such a question was involved in the decision to be made"

There can be no doubt, we think, that all these questions were known, or *ought to have been known, to be involved in the case.* The fact that the State court chooses to remain silent on any of them, is no sufficient reason why a party should be deprived of a hearing in this court.

We do not think we ought to be forced into an elaborate argument of these questions on a motion to dismiss or affirm. It ought to be sufficient if it appears, that there are debatable questions in the case involving important principles and interests, and we respectfully submit that among other questions here presented, the effect of the repeated acts of Congress declaring all of the navigable waters flowing into the Mississippi river is worthy of being reviewed and thoroughly considered by this court.

M. P. WING,
I. C. SLOAN,
Atty's for Plff. in error.

113-81

Office Supreme Court U. S.
FILED.
OCT 16 1884
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States,

To October Term, A. D. 1884.

WILLIAM H. POLLEYS, ET AL., *Plaintiffs in Error,*

—VS.—

THE BLACK RIVER IMPROVEMENT COMPANY.

Motion, Statement and Argument to Dismiss Writ of Error, or to Affirm.

S. U. PINNEY,
Counsel for Defendant.

Supreme Court of the United States.

Error to the Circuit Court of Wisconsin for LaCrosse County.

TO OCTOBER TERM, A. D. 1884.

WILLIAM H. POLLEYS, GEORGE CORNES, BENJAMIN E. EDWARDS, WILLIAM E. POLLEYS AND LA CROSSE BOOMING AND TRANSPORTATION COMPANY,

Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY,

Respondent.

GENTLEMEN: Take notice, that upon the record in this cause, a statement of the material parts of which is hereto subjoined, the said court will be moved at the Supreme Court rooms of the United States, at the Capitol in Washington, D. C., on the 20th day of October, A. D. 1884, or as soon thereafter, as counsel can be heard, on behalf of the said defendant, The Black River Improvement Company, to dismiss the writ of error in said cause, or to affirm the judgment of the Supreme Court of Wisconsin therein, upon the following grounds, to wit: 1

First. The said cause originated in the Circuit Court of Wisconsin for La Crosse County, and was tried and adjudicated therein, and on appeal to the Supreme Court of Wisconsin from the judgment of said Circuit Court, said judgment was reversed, and the said cause remanded on the 10th day of May, A. D. 1882, to the said Circuit Court, with directions to 2

that court to enter the judgment upon which the writ is sued out, and which was rendered May 24, A. D. 1882; that the
3 writ above mentioned was not brought until May 28, A. D. 1884, and more than two years after the entry of the said judgment, by means whereof said writ was barred by the Statute of the United States, Sec. 1008.

Second. The writ is sued out upon a judgment recited therein as having been given by the Circuit Court of La Crosse county, whereas that court is not "The highest court in which a decision in the suit could be had," but is the state court of original jurisdiction, and over all judgments rendered therein, without any exception, the Supreme Court of the state has
4 appellate jurisdiction.

Third. There was not and is not involved in the said cause any Federal question, or question of Federal law, so that this court can take jurisdiction of the same on this writ.

Fourth. That although the writ herein recites that in this cause there "Was drawn in question the construction of *statutes of the United States*, and the said decision was against the right and privilege set up and claimed by the said above named defendants (plaintiffs in error), under *such statutes of*
5 *the United States*," yet it does not appear from said record what particular statute or statutes of the United States was drawn in question or the construction of which was drawn in question, in this cause, nor what right or privilege was set up or claimed by the plaintiffs in error under such statutes; and it does not appear from the record that the court below passed upon the construction of any statute or statutes of the United States, or on any right or privilege claimed under such. On the contrary, the opinion contained in the record shows that no
6 such question was presented or passed on in the court below.

Fifth If any principle or rule of Federal law is involved in this cause, the judgment of the court below is so clearly in conformity with the law that this writ of error must be regarded

as taken for delay merely and the judgment ofthe court below should be affirmed.

Dated September 20, 1884.

S. U. PINNEY,
Counsel for Defendant.

To Messrs. M. P. WING and G. C. PRENTISS,
Attorneys for Plaintiffs in Error.

STATEMENT OF RECORD.

This action was commenced and tried in the Circuit Court for La Crosse county, and resulted in a judgment denying the relief prayed for by the plaintiff (defendant in this court), and it took an appeal to the Supreme Court of the state, where the case was decided February 7th, 1882; that court adjudging "That the judgment of the Circuit Court of La Crosse county in this cause be, and the same is hereby reversed, with costs against the said respondents taxed at the sum of $499.70. And that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter judgment in accordance with the opinion of this court." A motion for rehearing was made and the cause was retained in the Supreme Court until the 10th day of May, A. D. 1882, when this motion was denied and the cause was remanded, and on the 24th day of May, 1882, the judgment was entered upon which this writ is brought May 28th, 1882, that being the day the writ was lodged in the clerk's office. This was *more than two years after the entry of the judgment.*

The opinion of the Supreme Court of Wisconsin, contained in the record, in conformity with which said last named judgment was entered, states the case very fully, and is here presented entire, with the finding of facts in the court below, which are omitted from the opinion, and the judgment as finally entered. See same case. *Sub nom. The Black River Improvement Company, v. The La Crosse Booming and Transportation Company, et al.*, 54 Wis., 660-687.

OPINION.

11 TAYLOR J. "The plaintiff and the principal defendant in this action are corporations, the first organized under a special law of the state, and the second under a general law — chapter 144, Laws 1872. The action is brought for the purpose of restraining the defendant company and its officers and agents from interfering with the property and franchises of the plaintiff company.

"The plaintiff was incorporated, and derives all its powers and franchises from chapter 84, P. & L. Laws of 1864, amended by chapter 447, P. & L. Laws of 1866. The powers conferred
12 upon it are declared in section one of said chapter 84, Laws of 1864. After giving the names of certain persons as corporators, the act declares "that they shall be and hereby are created, in accordance with the provisions of this act a body corporate and politic, by the name and style of the Black River Improvement Company, and by that name shall have succession and continue for twenty-five years, *and shall have power and authority*, and they are hereby authorized and empowered to improve the navigation of the Black river, and lakes near
13 the mouth of the same, in the counties of Clark, Jackson Trempealeau and La Crosse, in the state of Wisconsin, *by removing obstructions, breaking jams, deepening, widening and straightening the channel, closing up chutes and side-cuts leading from said river into the Mississippi river, and into the bottom lands of said river, and into sloughs; to construct levees and dykes, and repair and straighten the banks of said Black river*, and to contract and be contracted with, sue and be sueds implead and be impleaded, in all courts of law and equity whatever, and make and have a common seal," etc.
14

The amendment made to this charter by chapter 447, Laws of 1866, simply added the words, "building dams," after the word "obstructions," in said section. The ninth section of the act gave the corporation the power to charge certain tolls upon logs,

timber and lumber run on said river, after expending in improvements certain sums of money mentioned therein.

"The defendant corporation was organized under chapter 144, Laws of 1872, and in the articles of association the powers of the corporation were stated as follows: 15

"For the purpose of manufacturing, by steam or water power, within the county of LaCrosse or elsewhere, lumber, lath, pickets, timber, and all other products of wood material for market, and to purchase and sell timber, lumber, logs and all other wooden materials and products, and all such merchandise as may be necessary in such business; and also *of improving Black river and sloughs for navigation, from John Lytle's mill on said river to its mouth and entrance into the Mississippi river by way of the Main river and Black Snake river and French slough, for the purpose of booming, driving, rafting,* 16 *holding and manufacturing logs, timber and other wooden materials for the use of the company or of other persons*, and to purchase and sell all such materials and real estate as said company may deem expedient; also of transporting property of all kinds on the Mississippi river and tributaries by vessels and water craft, and to purchase and charter all necessary vessels for towing purposes, as common carriers or otherwise, upon the Mississippi river and its tributaries, and to charge a reasonable compensation therefor for all booming, rafting, manufacturing, transporting and towing or other services for other persons, *and with power to construct such improvements in said streams by way of improving the navigation of the same, and such* 17 *booms, piers, piles, assorting works, rafting works, holding grounds for materials*, and purchasing and leasing such real estate as said company may need."

The principal controversy in this case grows out of the attempt of the defendant company to keep open what in their articles of association is called the Black Snake river, and to improve the same for purposes of navigation. The evidence shows that what is called the Black Snake river is, in the original plats of the United States survey, called the West Branch, and is in fact a part of the waters of the Black river. The 18 water constituting the Black Snake leaves the channel of the Black river at a point below Lytle's mills, and runs to the west of the main channel of the Black river through low grounds for about two miles, and then empties into what is called Rice

lake. The main channel bears to the east and empties into the same lake. From that lake to the Mississippi, in an ordinary stage of water, all of the water of the Black river flows in one ordinary stream to the Mississippi. The West Branch, or Black Snake, was returned as a meandered stream on the government surveys from the point where it leaves the Black river to Rice lake, and in its original state it was useful for the purpose of running logs, as deep or deeper than the main channel, but not as wide, and more tortuous in its course. The evidence in the case shows that the plaintiff corporation, as soon as organized, and before 1866, closed up the Black Snake river at its upper end, where it first leaves the Black river, for the purpose of turning its waters into the main channel, in order to increase the volume of water in that channel. It also shows that the west bank of the Black river, immediately above the point where the Black Snake departed from the main channel, was low, so that whenever there was any considerable rise of water in the river it overflowed that bank and passed off into the low lands between the river and the Mississippi, and did not return again into the Black river; and that the plaintiff corporation, in order to prevent this overflow and increase the volume and depth of the water in the Black river, built a dyke or embankment on the west bank of the Black river, from the mouth of the Black Snake north, for a distance of a half mile or more; and that this embankment was maintained by the plaintiff corporation, as well as the dam or obstruction which prevented the flow of water from the Black river into the Black Snake river, from the time they were built until after the organization of the defendant corporation in 1876. The evidence also shows that the defendant corporation, immediately after its incorporation, broke down the dyke of the plaintiff on the west bank of the river, near the place where the waters of the Black Snake left the main river, so as to permit the waters to flow into the Black Snake channel the same as they did before the plaintiff's improve-

ments were made, and has since continued to keep open the breach in said dyke or embankment.

"In order to present the material questions in the case it 23
will not be necessary to review the testimony to any extent, as the findings of fact and conclusions of law drawn therefrom by the learned circuit judge present the real questions concerning which there is any dispute. The findings of fact are very full, and as to the material matters there is no great dispute as to their general accuracy. If the learned circuit judge has erred in the matter, the error is in the conclusions of law which he draws from such facts. We will therefore omit from this opinion the findings of fact, and insert merely the conclusions of law as the basis of our views in examining the cor- 24
rectness of the conclusions arrived at by the learned circuit judge. The following are the conclusions of law as declared by the circuit judge.

"(1.) That the channel called the Black Snake is a part of Black river, and is a public highway.

"(2.) That the plaintiff's charter did not authorize the plaintiff to close up Black Snake channel, so as to destroy its navigability, nor so as to prevent its use by the public as a highway.

"(3.) That the owners of the Black Snake channel have, as 25
an incident to such ownership, the right to have the water of Black river flow past their land as it was accustomed to flow, the right of access to the navigable waters of Black river from their own banks, and the right to land their own logs and property from the navigable waters of the river upon their own banks. The plaintiff had not, and has not the right to close up the Black Snake channel, nor to prevent the natural flow of water therein, so as to destroy the rights of riparian owners upon that channel; nor to erect or maintain levees or embankments on the banks of said Black river, without making compensation to the riparian owners.

"(4.) That the plaintiff's proceedings for the condemnation 26
of several tracts of land, as described and set forth in the complaint were abandoned, and gave the plaintiff no right in such lands.

"(5.) That there is nothing in plaintiff's charter which forbids the riparian owners upon the Black river, or upon any of its navigable channels to exercise the right to maintain

in the stream, in front of their own banks, suitable booms, piers, assorting and rafting works, in aid of the navigation of the stream with logs; at their peril only of obstructing navigation. The construction of such works by riparian owners is not an invasion of the plaintiff's rights under its charter.

"(6.) That the defendant the La Crosse Booming and Transportation Company, being the owner of both banks of the Black Snake channel, had and has the right to maintain in front of its banks on that channel, in aid of the navigation of the Black river with logs, suitable booms, piers and rafting works, and the right to float its logs into and upon that channel to its booms and rafting works. In the lawful exercise of those rights it might lawfully remove the obstructions placed there by the plaintiff, without lawful right, which prevented such use of that channel.

"(7.) That it does not prejudice the plaintiff that the defendant cut the embankment at a place other than the meandered channel.

"(8.) That the La Crosse Booming and Transportation Company may lawfully, as against the plaintiff, maintain and operate in the Black river, in front of its own banks, suitable and sufficient assorting works to enable it to separate its own logs from the logs of other owners

"(9.) That the plaintiff, being neither the owner nor the driver of logs, is not injured by the detention of logs occasioned by the maintenance and operation of the defendant's assorting works. If such works are or should become an obstruction to the navigation of the river with logs, that fact gives the plaintiff no right of private action.

"(10). That although the low land or depression between Rice lake and French lake is not a natural watercourse between the two lakes named, yet it is not unlawful, as against the plaintiff, for the defendant to run its rafts of logs from its rafting works in the Black Snake channel to the Mississippi river by that route.

"(11). That the plaintiff has no cause of action against the defendants, and that the complaint should be dismissed with costs to the defendants."

It will be seen from the conclusions of law above recited, as well as from the very able opinion of the learned Circuit Judge which he filed upon the determination of this case, and especially by a subsequent opinion delivered by him in the case of *The Black River Flooding Dam Association v. Ketchum*, *ante.* p. 313, that the learned Circuit Judge held that the right of the

appellant corporation under its charter, to improve the navigation of the Black river within the limits prescribed by the charter, in the manner and methods designated therein, were not repealed by the enactment of chapter 144, laws of 1872, under which the defendant's incorporation was perfected, nor by the similar provisions of law re-enacted in the revised statutes of 1878; that no association or corporation formed under chapter 144, laws of 1872, as amended by chapter 399, laws of 1876, or by section 1877, R. S. 1878, was authorized to interfere with any works of the appellant, lawfully constructed under its charter, for the improvement of said river, or to make any improvements in said river within the limits prescribed in the appellant's charter, of a like character to those authorized by that charter. The learned judge held, as we understand from said opinion, that within the limits of the appellant's charter the right to improve the navigation of the Black river in the manner and by the means designated therein was exclusive, and that no other company or corporation organized under said general laws would have the right to make improvements of a similar kind, and charge any tolls for the use of such improvements during the continuance of the appellant's charter, or until the same was revoked by the legislature, or the franchises were declared forfeited by a court of competent jurisdiction. In respect to this part of the decision of the learned Circuit Court, certainly the appellant has no reason to complain; and as it does not appear that any exceptions were taken by the defendant corporation, either to the findings of fact or conclusions of law, so far as the matters above stated are concerned, they must be taken as the law of the case upon this appeal.

The material questions arising upon the findings in this case are two:

First. Had the appellant the right under its charter to close up the Black Snake for the purpose of turning its waters

into the main channel in order to improve the navigation of that channel?

35 *Second.* Was it lawful for the corporation to close the Black Snake channel for such purpose, without first making compensation to the riparian owners along the line of the Black Snake, for any injury they might sustain by the diversion of its waters from its natural course into the main channel?

The other questions as to the right of the riparian owners on the Black River to maintain in front of their lands booms and piers, assorting and rafting works, not obstructing navigation thereby, or interfering with the appellant's improve-
36 ments need not be discussed or determined in this opinion. The learned circuit judge determined both of these questions above stated in the negative, and as we understand it, determined the case against the appellant, because its acts in these respects were void, and that the appellant had no ground for complaint by reason of the acts of the defendant corporation, because such acts were lawful.

Upon the first point the learned circuit judge determined that under the provisions of the appellant's charter, it had no right to close up the Black Snake West or Branch, because it
37 was a navigable stream at and before the charter was granted to the appellant, and that it does not come within the language of the act. The language of the act is: "They shall have power and they are hereby authorized and empowered to improve the navigation of the Black river and the lakes near the mouth of the same, * * * by removing obstructions, buildings, dams, breaking jams, deepening, widening and straightening the channel, closing up chutes and side cuts leading from said river into the Mississippi river and into the bottom lands
38 of said river and into sloughs, to erect booms and piers, to construct levees and dykes and repair and straighten the banks of said Black river." It is said that, strictly construed, these words do not authorize the closing up of the Black Snake, because it is neither a chute or side cut leading from said river

into the Mississippi river or into the bottom lands of said river or into a slough. It will be seen that there is no prohibition in the words granting the power to close up chutes and side 39
cuts, against closing up navigable chutes and side cuts. There can be no inference therefore drawn from the words used that it was not the intention of the legislature to grant the power of closing up navigable waters of the kind specified, if it became necessary to do so in order to make improvements in the navigation of the Black river, which was the purpose of the grant of power. The evidence in fact shows that there were chutes and side cuts which were sometimes navigable for running and rafting logs in the vicinity of the Black Snake, which came clearly within the terms of the charter, and which 40
might, therefore, be closed under the power granted. It is possible that within the rules of law which require a strict construction of the language conferring powers upon corporations, the Black Snake might not be included within the grant of power. But it is evident the legislature did not intend that this rule should apply to this charter because in section 14 it is declared that the act "shall be deemed a public act, and its provisions shall be liberally and favorably construed." These words evidently mean that it shall be liberally and favorably 41
construed for the accomplishment of the purposes of the act, viz.; the improvement of the navigation of the river. The provision of the act authorizing the building of the levees, dykes and dams clearly indicate that one of the proposed methods for improving the navigation of the river was by confining the channel where it had a tendency to spread out into a shallow stream so as to be incapable of floating logs and timber, and the authority to close side cuts and chutes was evidently for the same purpose, as well as for the purpose 42
of preventing the logs and timber leaving the channel in high water and floating off into low grounds and timber lands adjoining the west bank, and between that and the Mississippi river. The 23d finding of fact shows the character of the land

between the west bank of Black river and along the Mississippi river, and the 29th finding of facts shows "that in times
43 of low water in the Black river there is not sufficient water to navigate both the Black Snake and the east channel fully; but that the said Black river is ordinarily subject to periodical rises attributable to natural causes, occurring annually, and during such periods of high water, both the Black Snake and the east channel are fully navigable for rafts and logs." How long this high water continues in each year when both channels can be navigated, is not found by the learned judge.

Although there is no finding upon that subject, the evidence shows that what is called the Black Snake was a narrow stream
44 compared with the main river, but deeper than the main channel in most of its course, that it ran through low ground, its course was crooked and in high water would spread out so as to make it difficult to tell where the channel was. One witness for the defendant says that where the Snake left the main river it was about 60 or 70 feet wide, and the main river about 150 feet wide. Other evidence shows that the average width of the Black Snake was about 70 feet, and of the main channel about 140 feet. The evidence also shows that for
45 some distance above where the waters of the Black Snake left the main channel, the west bank was low, so that when there was any considerable rise in the waters of the river, it overflowed that bank and passed into the Black Snake and into the low lands adjoining it. One of the defendant's witnesses, Mr. Robert Douglass, testified that in an early day when he passed up the Black Snake there were three openings from that river into the main river, that they were deep enough to float a canoe, but not deep enough to float a raft, and that the three came together and made the Snake, about 30 or 40 rods
46 from the place where they left the main river, and that in order to get from the Snake to the river they had to cut away the trees which hung over the opening. It will also be seen from an examination of the testimony that very many witnesses call the openings from the river, through which the

waters flowed to form the Snake, "chutes." The witness Douglass says there were three "chutes" there coming out of the Black river, and uniting formed the Snake. The other witnesses apply the same term to these openings. It would seem from all the evidence in the case that the waters which formed the Black Snake escaped over the low banks on the west side of the Black river in high water, and formed channels, which in low water were shallow where they left the river, and that, after flowing a short distance they united in low ground and formed the channel of that river; that they followed in this channel down to Rice Lake, in which the main channel of the Black river also flowed, and from there the waters of both streams again united and flowed by one channel to the Mississippi through dry ground. 47 48

We think the evidence also shows that the closing of the Black Snake was a reasonable means of improving the navigation of the main channel. The power given the appellant corporation to build levees, dykes and dams shows very clearly that the act contemplated the use of the levees, dykes and dams for the purpose of confining the waters of the river within its channel and prevent its overflow and spreading into the low grounds along its shores, so that the logs and timber coming down the same should be prevented from floating off into the grounds adjacent, and be with more certainty confined within the banks of the river and so safely floated to its junction with the Mississippi. A reasonably liberal interpretation of the words "chutes" and "side cuts" would include the openings from the main river into the Black Snake, and if it be objected that these chutes or side cuts did not lead the waters from the Black river into the Mississippi, still we think it is not straining the meaning of the act to say that the chutes or side cuts from the Black river to the Snake river lead the waters of said Black river into the bottom lands of said river and into sloughs. From the nature of said Black river and the grounds through which it passes, and because it again re- 49 50

turns into and mingles its waters with the main river it might well be termed a slough within the meaning of said act-
51 although perhaps not strictly a slough according to the defi, nition of lexicographers. But as the word "chute" has come to mean in the common language of our river men any opening in the banks of a stream where a part of its waters diverge from the main stream irrespective of the question whether it flows out with a rapid or slow current, so where a part of the waters of a stream in its downward course diverges from the main channel and returns to it lower down, it is usually called a "slough," and especially if in its separate course it runs with a slow current and through low grounds. It was said
52 by the late learned Chief Justice RYAN in his opinion in the case of the *Stevens Point Boom Company v. Reilly*, 44 Wis., 302, that "In rivers like the Wisconsin it may not be always easy to determine which is the main channel and which is the slough. And indeed the natural action of the waters of the river may, from time to time, alter the character of its channels, making what was before a slough, the main channel, and what was before the main channel, a slough." In using this language he used the word "slough" as including a side cut
53 like the one in question in this case, and he clearly understood the word "slough" to mean a channel diverging from the main channel and returning into it again at a lower point, making the word "slough" include such side cut irrespective of the character of the ground through which it passed or the velocity of its current. We know as matter of history that streams diverging from the main stream, whether returning into it again or forming a distinct outlet for the waters of a river into some other body of water are called sloughs, even though nav-
54 igable for steamboats. There are two or more such sloughs at the mouth of the Chippewa river which have become somewhat noted in the courts of this state as well as of the United States. We are clearly of the opinion that a fair and just construction of the appellant's charter gave the corporation

the right to close the entrance to what is termed Black Snake river. It was nothing more than closing up the chutes and side cuts which lead the waters of the Black river into the bottom lands and sloughs adjoining the same. 55

The learned circuit judge before whom this case was tried, seemed inclined to hold that the language of the statute did not give the right to close the Black Snake, because it was a navigable stream, and not covered by the words chutes or side cuts leading, etc. We think in so holding he gave too strict a construction to the powers of the corporation.

The learned judge further held that if the charter did grant the power to close up the same, it had no right to do so without first making compensation to the riparian owners. In his 56 third conclusion of law he says: "The owners of the Black Snake channel have, as an incident to such ownership, the right to have the water of Black river flow past their land, as it was accustomed to flow, the right of access to the navigable waters of Black river from their own banks, and the right to land their own logs and property from the navigable waters of the river upon their own banks. The plaintiff has not and had not the right to close up the Black Snake channel nor to prevent the natural flow of the water therein, so as to destroy 57 the rights of riparian owners upon that channel; nor to erect or maintain levees or embankments on the banks of Black river without making compensation to the riparian owners." And because it was not claimed by the plaintiff that it had made any compensation to the owners of the land along the Black Snake, or to the owners of the shore of the Black river where it maintained its dyke or levee, he held that the defendant corporation had the right to remove such dyke or levee in order to turn the waters of the Black river into the Black 58 Snake channel to the same extent that they ran through said channel before the plaintiff's levee and embankments were made.

The place where the levee or embankment was opened by

the defendant corporation was on lot 6 or 7, section 22, town 17 north, range 8 west. The learned circuit judge in his findings of fact does not determine upon which lot the levee or
59 embankment was opened by the defendant, and from the evidence returned it is difficult to determine whether it was on lot 6 or 7 of said section, and for the purposes of this action it is not material upon which of the two it was made. Lot 6 was, at the time the embankment or levee was made, swamp land and was owned by the state down to the year 1875, and lot 7 had then been contracted to be sold to one Mc Millan, who continued to own and possess the same until 1874, but was afterwards forfeited to the state, and the state again sold said lot
60 Jan. 22, 1875, to Benjamin E. Edwards, and Edwards conveyed the same to the defendant Polleys. And the circuit judge finds that the plaintiff erected and maintained the embankment and dyke on said lot 7, with the full knowledge and consent of the owner Mc Millan from the time the same was built down to the year 1874, when it was forfeited to the state. The learned circuit judge seems to place the right of the defendant to remove the embankment upon two grounds: First, Upon the fact that it was the owner of the lands upon which it was
61 situate at the time the embankment was removed, and because it was placed there without making compensation to it as its present owner, and because no compensation had been made to the state under whom it claims title; and Second, Because it was the owner of the banks along the Black Snake, and as such owner had the right to have the water of the Black river flow into its old channel as it was accustomed to do before the appellant company closed the mouth of the same, and because no compensation had been made to it or its grantees by
62 the plaintiff, it had the right to remove the obstructions placed by the plaintiff in the river to prevent such flow, whether such obstructions were on the defendants land or not.

Upon the first point we are of the opinion that any embank-

ment which was made by the plaintiff on lands adjoining the Black river under its charter, in order to confine its waters, then owned by the state, was lawfully made without making any compensstion to the state. The charter granted by 63
the state, giving the corporation the power to build and maintain levees and embankments along the shores of the Black river, in order to improve the navigation of the same, by necessary implication gave the corporation the right to use any lands owned by the state for that purpose, which were located on the shores of said river. And as to lands upon which such embankments were made whilst title remained in the state, the purchaser thereof from the state by a subsequent conveyance would take the same subject to the right 64
in the plaintiff to maintain such embankments upon such lands. In construing the act of incorporation we are bound to take into consideration the situation of things at the time the grant was made, as well as the purpose of the grant. At the time the charter was granted to the plaintiff, the lands along the river, where it would be necessary to make embankments and levees, were to a great extent owned by the state, and as there was no means provided by the charter by which the corporation could acquire the right to make such embank- 65
ments or levees upon the state lands by making compensation to the state, while the charter contained provisions for acquiring the right from private owners, although such provisions may have been insufficient to accomplish that purpose, it would seem to be a fair inference that the legislature intended to grant the right of such use to the corporation without compensation as to all lands owned by it, which it would become necessary to use in executing the purposes of the grant.

It has been held by other courts, and such appears to be the 66
settled construction, that when the legislature authorizes a public highway or other public improvement of a like nature, the making of which will necessarily require the taking or use

of the public lands, and no negative words are contained in the charter and no provision made for making compensaaion
67 to the state for public lands so required to be taken, that the right to use or take the same for such purpose is conferred upon the corporation without making compensation therefor. This construction of the plaintiff's charter is very strongly supported by the following cases cited by the learned counsel for the appellant: *Ind. C. Railroad Co. vs. State*, 3 Ind., 421. *Pa. Railroad Co. v. Railroad Co.*, 8 C. E. Green (Ch.) 157; *Davis v. Georgia R. R. Co.*, 1 Sneed, 94; *United States vs. Railroad Bridge Co.*, 6 McLean, 517. And while we are unwilling to commit ourselves to the full extent of the doctrine as laid
68 down in the first case above cited, we are clearly of the opinion that the doctrine should be applied to this case, to the extent of holding that as to all lands owned by the state on the margin of the Black river at the time of making the improvements by the plaintiff, it had the right to use such state lands as were necessary to make levees and embankments to accomplish the purposes of the charter, without making compensation therefor, and, further, that as to the state it had the right to close up any chutes or side cuts for the purposes of such
69 improvement, whether such chutes or side cuts were navigable or otherwise; and that if the state had any riparian rights as owner of the lands on the banks of such chutes and side cuts, the corporation had the right, without making compensation, to destroy such rights, so far as the closing up of said chutes and side cuts would destroy them; and that all subsequent purchasers from the state would take, subject to such right of the plaintiff. As having some weight in the determination of this question, we may be permitted to take into consideration
70 the general policy of the state upon questions of a similar character. No case can probably be found where any compensation was required to be paid to the state for the opening of ordinary public highways through lands owned by the state; and in relation to the construction of railroads, as early

as 1857, the legislature passed an act giving a right of way, without compensation, through the university, school, swamp and overflowed lands of the state, one hundrad feet in width 71
to every railroad thereafter constructed in this state. Chapter 9, L. 1878; chapter 79, R. S. 1858; section 1270 R. S. 1878. We are inclined to hold that the levees and embankments made by the plaintiff along the margin of Black river upon lands owned by the state at the time the same were made, were lawfully made without making any compensation to the state, or to the purchasers from the state. The levee or embankment made upon lot seven was made with the consent of the then owner, who held a contract from the state, and so far as the
state retained the title with its consent, and the purchaser 72
having afterwards forfeited his rights to the land, and the state again becoming the absolute owner, its subsequent grantee must take the same, subject to the right of the plaintiff to maintain said levee or embankments. Under the decisions of this court, when the purchaser, McMillan, failed to pay the interest on his certificate of purchase of lot seven, the right of the state became as perfect as though no sale had ever been made, and the title of the state was the same as if no certificate had ever been issued, *Conklin vs. Hawthorne*, 29 Wis., 73
476-480; *Smith vs. Mariner*, 5 Wis., 578. In this view of the case, the defendants had no right to interfere with the levees or embankments of the plaintiffs, on any lands which were owned by the state at the time the same were made.

The only other ground of justification of their acts is based upon the other alleged fact that as owners of lands on the margin of the Black Snake river, they had a right to have the water of said river flow past their lands as it was accustomed to do before the entrance of said river was obstructed by the 74
plaintiff, unless compensation was first made to them for obstructing the flow in said river. As to those lands which the defendants purchased from the state on the margin of the Black Snake after the waters of said stream had been ob-

structed by the plaintiff, they were not entitled to any compensation for the obstruction of such flow. The state having
75 authorized such obstruction and having made no provision that the corporation should make the state any compensation on account thereof, none can be claimed by the state nor by its grantees subsequent to the time when such obstructions were made.

The findings of fact do not show that the defendants or any of them are now or were at the time of the acts complained of by the plaintiff, the owners of any lands on the shores of the Black Snake, the title to which was not in the State of Wisconsin at the time the obstructions were made which prevent the flow
76 of the waters of the Black river into the same. And after an examination of the record we are unable to say with any certainty that they were or are now the owners of any lands on said Black Snake, which were not owned by the state at that time, except lot 8, in sec. 22, T. 17, R. 8 west. This lot 8 is a very small parcel of land at the point where, according to the government survey, the waters of the Black river were diverted into what is now called the Black Snake. This tract of land contains but a very few acres, and lies between the main
77 river and the Black Snake, so that the owner thereof can have access to the waters of the main channel without passing up the Black Snake. But as we may be mistaken upon this question of fact, and the defendants may be the owners of lands on the banks of the Black Snake between the place where its waters leave the main channel and Rice lake, the title to which was not in the state at the time the obstructions were made by the plaintiffs, it becomes necessary for us to inquire whether the ownership of such property by the defendants
78 would justify them in removing the plaintiff's levee or embankment for the purpose of restoring the accustomed flow of water in the old channel of the Black Snake through or in front of the lands so owned by the defendants.

The learned circuit judge held that unless the plaintiff

had made compensation to such parties for any damage resulting to such riparian owners, its acts as to them were unlawful and they were at liberty to right themselves by 79
destroying so much of their work as might be necessary to restore the flow of the waters in the Black Snake as the same were accustomed to flow before the plaintiff's obstructions were put into the river. Admitting such ownership on the part of the defendants, it is contended by the learned counsel for the plaintiff that, as such owners, they have no such vested right to the waters flowing in said Black Snake, as will prevent the state, or the plaintiff acting in behalf of the state, from diverting such waters from that channel, if it
becomes necessary or convenient to do so in order to improve 80
the navigation of the main channel of the river. It is claimed that the riparian owner on a navigable stream has no right as against the public, or persons or corporations acting in behalf of the public, making improvements on such navigable stream, to have the waters of such stream flow in their accustomed course in front of his lands, and this contention on the part of the learned counsel for the appellant is, we think, sustained by the most learned courts of this country, and that doctrine has been quite clearly sanctioned by 81
several decisions of this court. *Canal Appraisers v. The People*, 17 Wend., 571; *People v. Canal Appraisers*, 33 N. Y., 461, 500. These cases were thoroughly discussed by learned counsel, and the opinions delivered were learned and exhaustive of the subject, and in both cases it was held "that riparian owners along a navigable stream are not entitled to damages for any diversion or use of the water by the state." In these cases the waters were not diverted in order to improve the navigation of the same stream, but to supply the
Erie canal, an artificial water course, constructed by the state. 82
Lansing v. Smith, 8 Cow., 146, and many other cases in that state are to the same effect.

In *Hollister vs. Union Co.*, 9 Conn., 436, it was held that as

to navigable rivers, the state holding the river for that purpose may do everything for the full enjoyment of such right, not
83 inconsistent with the great cohstitutional provision that private property shall not be taken for public use without just compensation," and that consequently the placing of piers and other obstructions in the river in good faith by a company authorized by the state to improve the navigation of such river, by means of which the water within the banks of the river was raised, and the current thereof changed opposite the plaintiff's land, by reason whereof his bank was undermined and washed away, did not give any cause of action against the company.
84

In *McKeen vs. Delaware Canal Co.*, 49 Pa., 424, it was held that "every one who buys property upon a navigable stream, purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or his works for the qualified use he may make of the water within the limits or influence of high water, he does so at his own risk, and cannot complain when the commonwealth chooses to maintain the waters of the stream at a given height within its chan-
85 nel." The same doctrine of the right to control the navigable waters of the state, by the state, without liability for damages, is held in the following cases in that state: *Monongahela Navigation Co. v. Coons*, 6 W. & S., 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S., 9; *Monongahela Bridge Co. v. Kirke*, 46 Penn. St., 112. And many other decisions of the courts of that state hold the same doctride.

In the case of *Fitchburg Railroad Co. v. Railroad Co.*, 3 Cush., 58-88, Chief Justice SHAW says: "It is incident to the
86 power of the legislature to regulate a navigable stream so as best to promote the public convenience; and if in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*. See also *Rundle v. Delaware & Raritan Canal Co.*, 14

How. (U. S.), 80.; *Wilson v. The Black Bird Creek Marsh Co.*, 2 Peters, 250; *Transportation Co. v. Chicago*, 9 Otto (U. S.), 635; *Pumpelly v. Green Bay Co.*, 13 Wall., 166–181; *Fay v.* 87
Aqueduct Co., 111 Mass., 27; *Com'rs of Homochitto River v. Withers*, 29 Miss., 21; *Treat v. Lord*, 45 Maine, 552. These cases and many others hold the doctrine that the waters in a navigable river or other navigable body of water, are so far the property of the state, that the state may control them for public purposes in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such water ways are as much subject to the control of the state for the purposes of 88
the improvement of such ways as a highway upon the land. The right of the public to raise or lower the grading of a public street, without being required to compensate the adjacent owners is well established by the decisions of this court: *Dore v. City of Milwaukee*, 42 Wis, 108; *Harrison v. Board of Supervisors*, 51 Wis., 645; and the right to discontinue a highway without making compensation has always been recognized by the law. The right of the riparian owner to have the water in a navigable stream flow past his lands 89
adjoining the same, as they were accustomed to flow is as perfect against everybody except the state, or some person or corporation standing in its stead, as it is in the case of unnavigable streams, and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownerswip; see *Cohn v. Wausau Boom Co.*, 47 Wis., 315–322; and the right of the state to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in 90
the riparian owner.

The doctrine of the cases above cited has, we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the im-

provement of the navigation thereof. Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, 91 whereby injury may result to the riparian owner without making compensation therefor, need not be determined in this case. The plaintiff represents the state for the purpose of improving the navigation of the Black river, and what they have done under their charter, and which is complained of by the defendants, we think must be, for the purposes of this action, considered to have been done for the improvement of navigation in said river. And, as against the state or the plaintiff acting in its stead, we think this state has determined that the ripa- 92 rian owners on the banks of the Black river or the Black Snake river have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of and through their lands. See *Wisconsin River Improvement Company v. Lyons*, 30 Wis., 61–65; *Cohn v. The Wausau Boom Company*, 47 Wis., 314; *Stevens Point Boom Company v. Reilly*, 46 Wis., 237. In the cases last cited the rights of a riparian owner upon a navigable stream, and the power of the state to restrict, limit or take away such rights, were fully dis- 93 cussed, and this court, after mature deliberation, came to the conclusion that these rights are the subject of legislative control without making compensation, where they are taken for the purpose of improving the navigation of such stream.

In the case of *Cohn v. Wausau Boom Co.*, *supra*, the plaintiff brought an action to enjoin the defendant company from completing its work as authorized by their charter upon the ground that he was a riparian owner of land upon such river, which he had bought for the purpose of building thereon a saw mill; that in the natural flow of the water in front of his 94 lands he could by the use of booms and other appliances stop the logs coming down said river, and hold them for the purpose of being manufactured in his mill; that he was the owner of large tracts of pine land above said point, and that by reason of the structures already completed, and others which the

defendants threatened to construct in the river and in front of his land, the channel of the river had been shifted from its natural place, the current in front thereof greatly increased, 95
and the water made to flow with great velocity so as to form the main channel of the river, and that by reason thereof the approach to the plaintiff's land had been rendered inaccessible for logs and lumber, all connection with the center of the stream cut off, and the fitness of the land for booming and mill purposes destroyed.

In the opionion delivered in that case by the late learned Chief Justice RYAN, he says: "The appellant must therefore be held to be a *quasi* public corporation, an agent for the state for the improvement of the river, and its franchises granted 96
for a public use. Of course private property of others could not be in any way appropriated or used by the appellant in aid of the public purpose, without authority of law, upon just compensation. But the land of the respondent is neither taken nor used; the works of the respondent neither touch it nor overflow it. The statutes under which the appellant acts authorize no such interference with the property of others. They only aid the public use for which the appellant is chartered, by restraining the exercise of a private right, which 97
the legislature appears to have considered inconsistent with it; a right which the respondent, as other riparian owners, held only by implied public license—as it were, as tenant by sufferance of the state; a right of which the exercise might always be prohibited by a public law in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way, *ex necessitate rei*, to public measures in aid of navigation." The learned Chief Justice then quotes the following language from his opinion 98
delivered in the case of *Stevens Point Boom Company v. Reilly*, 46 Wis., 237: "'The private right of the riparian owner is subordinate to the public use of the navigable river, and is always exercised at peril of obstructing navigation. This subjection

of the private right to public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right.' As against the riparian owners, within the limits specified in the statute, the state has only resumed its own. Otherwise, the title, posession and use of the respondent's land remain intact. If the public action lessen the value, it is literally *damnum absque injuria*."

It will be seen from a consideration of all the facts in that case, that this court also held that under authority from the state for the purpose of aiding navigation, the corporation had the right to keep and maintain in the river opposite to the riparian owner's land, and between the thread of the stream and the land of such owners permanent fixtures driven into or resting upon the soil under the navigable waters of the river, without making any compensation therefor. These opinions of this court seem to have adopted the doctrine of the cases above cited from the courts of other states and of the United States as to the power of the state to control the waters of all navigable rivers or other waters of the state, whenever such control is exercised in the interest of navigation. The action of the legislature upon this question of closing sloughs, would seem to indicate that such was also the view of the case taken by that department of the government; for in chapter 399, laws 1876, in defining the powers of improvement companies and authorizing them to close up sloughs amongst other things in aid of navigation, it is expressly provided that no such company shall close any sloughs, unless they own the entire shore on both sides thereof, or have the written consent of the owners thereof; and this same provision is re-enacted in section 1777, R. S., 1878. It would seem the legislature must have supposed they had the power to grant the right to close such sloughs without the consent of the owners of the shores, otherwise it would have been unnecessary to declare that it should not be done except with their consent.

The view entertained by this court in the cases above cited and in this case, is not in conflict with *Pumpelly v. Green Bay Co.*, 13 Wallace, 166, and *Arimond v. Canal Co.*, 31 Wis., 316. 103
In those cases the question was not as to the power of the state to interfere with or control the waters of navigable streams within their channels, but whether it had the right to force such waters out of their channels and flood the lands of the citizen without compensation. The distinction between these cases and cases like that in the case of *Cohn v. Wausau Boom Co.*, and the case at bar are commented upon by the courts in the opinions delivered therein.

The case of *Delaplaine v. Railroad Co.*, 42 Wis., 230, differs 104
from the case at bar and *Cohn v. Wausau Boom Co.* in the fact that the obstruction placed in the navigable waters in that case in front of the plaintiff's land was not placed there in aid of navigation for the improvement of the navigation, but for an entirely different purpose, and the doctrine laid down in that case must be restricted in its application to cases resting upon the same class of facts and cannot be extended to a case where the state places obstructions in the navigable waters of the state for the purpose of improving navigability of the stream. If it be though that the powers granted to the plaint- 105
iff corporation in this case were improvidently granted, and that some limit should have been placed on its right to close up navigable waters or interfere with the riparian rights of owners on the navigable waters so cleared up, the legislature is the tribunal to which application should be made to remedy such evil, and so if the corporation has so made its improvements that they are inadequate to furnish the facilities to navigation on the river which the increased business on the same demands, the legislature is competent to give the proper relief 106
in that direction. If the corporation has by the way in which their improvements have besn made and are maintained acted unreasonably or unnecessarily so as to obstruct navigation instead of improving it, the remedy should be either by a proper

action to forfeit the franchises of the corporation, or if the defendants have suffered any injury from from the obstruc-
107 tion to navigation, they have a remedy by an action at law; but they ought not to be permitted to abate without action, the works of the plaintiff, as a private nuisance.

We see no reason why the defendants may not for their own purpose maintain sorting and rafting works in the Black river opposite to their lands, so that they do not interfere in any way with the works of the plaintiff; or why they may not excavate in front of their lands in Rice lake for the purpose of aiding in rafting logs or for any other lawful purpose, if they do not interfere with the works of the plaintiff; and
108 except as to these matters we are of the opinion that the court should have granted the relief demanded by the plaintiff in its complaint.

By the Court. The judgment of the circuit court is reversed and the cause remanded with directions to the circuit court to enter judgment in accordance with this opinion.

The finding of facts referred to but not set out in the foregoing opinion is as follows, to wit:

1. That the plaintiff is a corporation, duly organized under
109 chapter 84 of the private and local laws of this state for the year 1864, entitled "An act to incorporate the Black River Improvement Company," and has been so organized and doing business under said act and the acts amendatory thereof, since about the date of the passage of said act.

2. That the defendants, the La Crosse Booming and Transportation Company, is a corporation duly organized under the general laws of the state for the year 1872, and its organization was completed January 7, 1876; that the usual patent was duly
110 issued to the defendants, William H. Polleys, George Cornes and Benjamin E. Edwards, incorporators therein, and to their successors and assigns, purporting to give them full authority under the name of the La Crosse Booming and Transportation

any, to improve Black river and sloughs for navigation

from John Lytle's mill in said county of La Crosse, to its mouth and entrance into the Mississippi river, by way of the main river, and Black Snake and French sloughs, and other 111
sloughs, for the purpose of booming, driving, rafting, holding and manufacturing, logs, timber and other wooden material for the use of said company, or of other persons; to purchase and hold chattels and real estate, with power to construct such improvements in said streams, by way of improving the navigation thereof, and to construct such harbors, piers, piles, sorting works, rafting works, holding grounds, for the use and purposes of such improvements.

3. That in 1865 the plaintiff commenced the work of im- 112
proving the navigation of said Black river in the counties mentioned in said chapter 84, by removing obstructions, closing dams, deepening, widening and straightening the channel closing up chutes and side cuts, erecting booms and piers, constructing levees and repairing the banks of said river, and necessarily expended in said improvements exceeding fifty thousand dollars. By means of such improvements the navigation of said river was improved. That the plaintiff, during the time aforesaid, has been, and now is, in the possession, use and occupation of the said works and improvements, authorized 113
by its said charter, and during the whole of that time has charged, collected and received tolls for the use of said works and improvements, for all logs and timber run over or through the same.

4. That the said Black river from its mouth in said La Crosse county, through the counties of La Crosse, Jackson, Clark and Trempealeau, at the time of the enactment of said chapter 84, had been meandered and returned as navigable by the surveyors employed by the government of the United 114
States, and was at said time navigable in fact, for logs, timber, rafts and keel-boats, and had been so used and navigated for more than twenty years before the commencement of plaintiff's said improvements.

5. That much of the lands along said Black river and tributaries are chiefly valuable for the pine timber thereon, and
115 that only by the use of said river can said timber be transported to the principal markets therefor; that the successful handling of said timber while being transported to a market requires the establishment of booms in said river at or near its mouth, for the holding, assorting and rafting of said logs, it being essential that the logs be made up into rafts before leaving the waters of the said Black river.

6. That for a distance of ten or twelve miles above the mouth thereof at La Crosse, the banks of said Black river are
116 in many places low, and the lands adjacent thereto, and between said river and the Mississippi river, distant therefrom one and one-half to two and one-half miles, are mainly low and marshy, in many instances penetrated by sloughs, side cuts, chutes and bayous, from the waters of said rivers, and at times of high water the said low and marshy lands are overflowed by the waters of said Mississippi and Black rivers; that at the time of the enactment of said chapter 84, a portion of the waters of said Black river left the main channel thereof on and along the said low lands by chutes, side cuts, sloughs
117 and bayous, in some cases flowing into the Mississippi river, and in some cases into the bottom lands between said rivers, and in some cases returning again into the waters of Black river, and large quantities of the logs which were being floated down said Black river left the main channel and were drawn into said chutes and side cuts, or carried over the said low banks upon said low, marshy lands, and the diversion of said waters through said chutes, side cuts, bayous and sloughs seriously interfered with the useful navigation of said river, by reason
118 thereof thereby diminishing the volume of water in said river.

7. That claiming authority for that purpose under said chapter 84, the plaintiff did, prior to 1866, close up chutes and side cuts leading out of said Black river into said low lands, in the county of La Crosse, and built levees along the bank of said

river, where the banks were low and subject to be overflowed in high water, to prevent the waters of said river from passing through said chutes, side cuts, bayous and sloughs, and to prevent the logs being driven down said river from leaving the channel, and floating over said low banks into and upon said low lands, by which means said waters and said logs were and are prevented from leaving said river through the chutes and side cuts so closed, and over the banks where said levees were built, and the navigation of said river was improved thereby. 119

8. That Hammond's chute is an outlet of the waters of Black river, branching from the main channel on section nine, township seventeen, range eight west, a part of its waters emptying into the Mississippi river and a part returning to the Black river waters by the way of Black Snake. That the running of loose logs in said Hammond's chute is not practicable because of the counter currents trom the Mississippi river therein. 120

9. That for eleven years next before the commencement of this action the plaintiff has kept and maintained a boom across Black river in said county of La Crosse, on section five, township sixteen, north, in range seven east, for the purpose of holding the logs and timber floated down said river and to be rafted at said La Crosse, and for the proper uses and purposes of its said boom the plaintiff has acquired the title to the following lands, to wit: the south twenty-two and thirty-hundredths acres of lot one and lot three, in section thirty-one, town seventeen north, in range seven west; and all that parf of lot three in section six, which lies between Black river and a line drawn twenty feet distant from the highest water mark of said river; lots one and two in section six, and lots five and six in section five; all in township sixteen north, in range seven west; which lands are valuable only for the use and benefit of plaintiff 's said works. 121 122

10. That the Black river and the navigable waters connected therewith, are tributaries to the Mississippi river. That the

Black river, from section twenty-two, township seventeen north, in range eight west, is divided naturally into two chan-
123 nels, which meet again in Rice lake, in section thirty-six, in same township. The western of said branches is called Black Snake, and before and at the time of the enactment of said chapter 84, had been meandered and returned as navigable, by the United States surveyors, and is designated upon the government surveys as the western branch of Black river, and was in fact navigable for keel-boats and rafts, and logs and timber, and was the only navigable channel of Black river in low water, at a very early day; that said Black Snake so continued to be navigable, and to be navigated with rafts, logs and tim-
124 ber, until the plaintiff obstructed the same, as set forth in the complaint.

11. That about the year 1865 or 1866, the plaintiff, claiming the right to do so under said chapter 84, for the purpose of increasing the volume of water in said east branch, closed up said Black Snake, or west branch, by constructing an embankment across the same, thereby utterly preventing the waters from flowing therein, and thereafter the plaintiff maintained said embankment, and thereby prevented the waters of said
125 river flowing therein, until said embankment was removed by the defendant as herein stated.

12. That during or about said years 1865–6, the plaintiff, claiming the right to do so under said act, for the purpose of improving the navigation of said river, constructed levees along the west bank of Black river, through fractional lot three, in section fifteen, and fractional lots 6, 7 and 8, in section 22, in township 17 aforesaid, and has ever since maintained the same, except so much thereof as was removed by the defend-
12 ant as aforesaid.

13. That at the time the plaintiff constructed his levees or dykes across said lots 3, 6, 7 and 8, the state of Wisconsin was the owner in fee simple of said lots 3, 6 and 7, and also when said chapter 84 was enacted. That on the 20th day

of January, 1864, said lot 8 was sold by the county of La Crosse to the plaintiff, for the non-payment of taxes, and on the same day was duly conveyed to the plaintiff; that said 127
deed was duly recorded in the proper office on the 17th day of February, 1864. That at the time of the execution of said tax deed, said lot 8 was owned and occupied by one Abraham Pettinger, as a part of his farm; that said Pettinger continued in the actual possession of said lot 8 until he conveyed the same to the said Benjamin E. Edwards, as set forth in the complaint, and during that time cut his firewood, or a part thereof, on said lot 8, and pastured his cattle thereon, and used the same as his wood lot for the use of the farm
then occupied by said Pettinger; that said Pettinger so occu- 128
pied and was in actual possession thereof for more than three years next after the recording of the said tax-deed, and paid all the taxes thereon from the time of the said tax sale until he sold the same to said Edwards.

14. That when said levee was so constructed on lot 7, the commissioners of the state school and university lands had contracted to sell the same to one E. H. McMillan, and had issued to him the usual school land certificate therefor, bearing
date April 24, 1863, and thereafter such proceedings, transfers 129
and conveyances in regard to the said certificate were had that on the 16th day of January, 1867, Alexander McMillan became the sole owner thereof, and continued to own and possess the same until 1874, when he neglected to pay the interest due thereon, and by reason thereof the said lands became forfeited to the state, and thereafter, on the 22d day of January, 1875, the state of Wisconsin duly conveyed the same to the said Benjamin E. Edwards, and the said Edwards, on the 8th day of March, 1875, duly
conveyed the same to said William E. Polleys; that said levee 130
was so build on said lot with the full knowledge and consent of the then owner of the said certificate.

15. That the state of Wisconsin continued to own said lots

6, in section 22, and lot 3, in section 15, until the 10th day of April; 1875, when the state sold the same to the defendant,
131 William E. Polleys.

16. That after the said Benjamin E. Edwards purchased the title to said lot 8, he denied the right of the said plaintiff to maintain the said levee across the same; that on the 15th day of January, 1875, the plaintiff tendered to the said Edwards twenty-five dollars for a strip of land one hundred feet wide upon the bank adjoining the main channel of said Black river through said lot 8; that being the part of said lot upon which said levee of the plaintiff was and is situated, and the portion needed for the plaintiff's improvements; that said
132 land was of nominal value of twenty-five dollars; that said Edwards refused to accept the money so tendered; that on the 17th day of January, 1876, the plaintiff deposited the said sum with the clerk of the circuit court for La Crosse county, where the same now remains.

17. That the defendant William E. Polleys, after he procured said deed for said lot 7, and said patents of said lots 3 and 6, denied the right of the plaintiff to maintain said levee upon said lots, and on the 5th day of January 1876, the
133 plaintiff tendered to the said William E. Polleys twenty-five dollars for a strip of land one hundred feet wide upon the bank of and adjoining the main channel of said river through said lot 3, in section 15, said land being necessarily occupied by the plaintiff with said levee; and fifty dollars for a strip of land one hundred feet wide upon the bank of and adjoining the main channel of said river, through said lot 6, in section 22, the same being necessarily occupied by the plaintiff with its said levee; and one hundred dollars for a strip of land one hundred feet wide upon the bank of and adjoining said main
134 channel of said river through said lot 7, in said section 22, the same being necessarily occupied by the plaintiff with its said levee; that the said lands so described were, at the times the said sums were so tendered, of the nominal value of $10;

which said sums the said Polleys refused to receive. That on the 6th day of January, 1878, the plaintiff deposited said several sums of money with the clerk of the circuit court of the 135
said La Crosse county, where the same now remains.

18. That on the 17th day of January, 1876, having given due notice thereof, the plaintiff presented its petition to the Hon Romanzo Bunn, then judge of the Circuit Court for the 6th judicial circuit of this state, for the appointment of a commissioner to make an appraisal and award of the value of the several strips of lands, under said chapter 84. At the time and place appointed for the hearing of said petition the said William E. Polleys and the said Benjamin E. Edwards 136
appeared and resisted the appointment of said commissioner, and on the motion of said defendants the hearing of said petition was postponed to the 27th day of January, 1876. to the city of La Crosse. That on the 27th and 28th days of January, 1876, a partial hearing of said petition was had, the parties being present, and the said judge continued she hearing of said petition to the 17th day of May, 1876, and that said petition has not been otherwise disposed of, and no compensation or offer of compensation for the said lands has been made except as set forth in said petition. 137

19. That on the 24th day of January, 1876, the defendant William E. Polleys made and delivered to the defendant the La Crosse Booming and Transportation Company a deed of conveyance of said lot 3, in section 15, and lots 3, 6 and 6, in section 22, and lots 4 and 6, in section 26, lot 2, in section 35, and lot 8, in section 36; all in township 17, north of raage 8 west; and on the 17th day of January, 1870, the said Benjamin E. Edwards made and delivered to the said La Crosse Booming and Transportation Company a deed of 138
conveyance of said lot 8, in section 22, lot 8, of section 26, and lot 1, of section 35; in township 17, range 8, aforesaid.

20. That after the organization of the defendant the La Crosse Booming and Transportation Company, and after the

execution and delivery of the said deeds by the said William E. Polleys and Benjamin E. Edwards, and before the com-
139 mencement of this action, the said William E. Polleys, George Cornes and Benjamin E. Edwards, by the direction and for and in behalf of said La Crosse Booming and Transportation Company, cut and procured to be cut and removed a portion of the plaintiff's said levee, on said section 22, with the intent and purpose of permitting a portion of the waters of Black River to flow into anp through the said Black Snake channel, in the same manner and to the same extent as before the building of said levee across the same, and not otherwise, claiming the right to open said levee, and thereby to cause the
140 water to flow in said Black Snake, to be in the said La Crosse Booming and Transportation Company, under its said patent, in aid of the improvements authorized therein, and as riparian owner of the shores on both sides of the said Black Snake channel.

21. That the identical place where the said levee was cut and removed by the defendants as set forth in the complaint, was before the construction of said levee by the plaintiff, a navigable portion of the channel of the said Black Snake, and
141 used for the running of rafts and logs into and along said Black Snake channel. It was not the meandered channel.

23. That the volume of water flowing through the said sluice-way or opening in said levee is not greater than the volume of water belonging to the natural flow of water in the Black Snake channel before the same was closed by the plaintiff.

23. That between the head of the said Black Snake channel, in section 22 aforesaid, and the said Hammond's
142 chute, a distance of less than three miles, there has for many years existed, and does now exist, chutes, side-cuts and sloughs leading out of the Black River into the said bottom lands, through which the waters of said Black River escape and flow in volume exceeding the volume of water now flow-

ing in the said Black Snake, and there has existed for many years, and does now exist, portions of the bank of said Black River adjacent to the main channel thereof between the said 143
points so low that in ordinary stages of high water in said river, logs floating therein may leave the main channel and float over said low banks, and that large quantities of pine logs being run down said river are drawn into and through said sloughs, chutes and side-cuts, and float over the said low banks, upon the said low lands and are lost, or recovered only at great expense; that the closing up of said chutes, sloughs and side-cuts, and the building of levees over and along said low banks, and thereby preventing the escape of said logs from 144
the main channel through said chutes, side-cuts and sloughs, and over said low banks, is entirely practicable.

24. That if the chutes, side-cuts and sloughs mentioned in finding No. 23 were closed up, so as to retain in the waters flowing through them in Black River, the volume of water naturally flowing in said river would be sufficient to admit the successful navigation of both the east and west branches with logs at any fair, ordinary rafting stage in said river.

25. That by means of the plaintiff's said boom located on section 5, township 16 aforesaid, the said Black River has been 145
for the greater portion of the time since said boom was established, as set forth in the said complaint, entirely obstructed with logs caught and held in said boom for a long distance up said river from said boom; that no passage way past said boom and the said logs has ever been provided so that persons desiring to pass up or down said river past said obstruction with boats, logs or rafts could do so.

26. That the defendant, the La Crosse Booming and Transportation Company, has actually in good faith expended in 146
the construction of booms, piers, piles, deepening, widening and straighteding the channel, the construction of dividing booms and assorting works, and necessary buildings, and the purchase of lands, exceeding forty thousand dollars, and has acquired and is the owner of most of the land upon the shores

of both sides of the Black Snake channel, the entire length thereof; that said lands were acquired for the uses and pur-
147 poses of its said improvements, and the same are useful and valuable for that purpose and no other; that said La Crosse Booming and Transportation Company has, by means of its said works and improvements, suitable, efficient and convenient facilities for booming, assorting, holding, dividing and rafting expeditiously and economically, all the logs and timber coming into its possession for that purpose.

27. That the principal stockholders in the said La Crosse Booming and Transportation Company are owners of a large amount of pine timber bordering upon the Black River and
148 its tributaries, and said owners have contracted with said La Crosse Booming and Transportation Company to boom, hold and raft the logs made from said timber, and floated down said Black River.

28. That the said La Crosse Booming and Transportation Company has erected and keeps and maintains a boom and suitable assorting works in the Black River in front of its own lands on section 22, where it stops all logs floating down said river and detains the same long enough to sep-
149 arate the logs intended for its said boom from others, and passes its own into Black Snake, and the others pass down the east channel; that it is practicable to divide and assort at said works all the logs floating down the river, without serious delay, and the detention of the logs at the defendant's said assorting works is temporary, only for the purpose of dividing and assorting from the mass, the logs intended for the defendant's said boom; that the maintaining of the defendant's said assorting works has not and will not di-
150 minish the aggregate amount of logs delivered in said stream upon which tolls are chargeable.

29. In times of low water in the Black river there is not sufficient water to navigate both the Black Snake and the east channel fully, but the said Black river is ordinarily subject to

periodical rises attributable to natural causes, occurring annually, and during such periods of high water both the Black Snake and the east channel are fully navigable for rafts and 151
logs.

30. Between Rice lake and French lake, which latter is within the Mississippi waters, there is a depression similar to the bed of a stream and low water, over-grown with grass and weeds. From the highest ground between the two lakes a small stream flows to either lake. At times of high water in the Mississippi river its waters set back so as to cover all the low land between the two lakes in sufficient depth to float boats, rafts and logs; this is so in yearly freshets in the Mississippi river, and rafts of logs and lumber were run out of 152
Black river into the Mississippi river by way of such channel before the erection of the plaintiff's said boom and improvements. The La Crosse Booming and Transportation Company owns the lands between the two lakes, and when the water is sufficient for that purpose floats its rafts or logs from its rafting works in said Black Snake by that route into the Mississippi river.

31. The defendant, the La Crosse Booming and Transportation Company has made two excavations across two sharp 153
points of land around which the depression or channel mentioned turns sharply, for the purpose of straightening that channel to admit of the more easy passage of rafts along the same, and for no other purpose, and has had intended or threatened to make any other or greater excavations than that mentioned, and that the waters naturally flowing in the Black river have not been and will not be diverted therefrom by the said excavations.

32. That it is practicable to run rafts of logs from the boom 154
and rafting works of the La Crosse Booming and Transportation Company in Black Snake into the Mississippi river, by the way of Black river, except for the plaintiff's said boom, and the logs detained by it, but when the plaintiff's said boom is in

place across said Black river on said section 5, logs cannot be run from the defendant's said boom and rafting works into
14 155 the Mississippi river, by the way of Black river, and can only be run into the Mississippi river by way of the said route between Rice lake and French lake.

33. That in the season of 1879, the defendant, the La Crosse Booming and Transportation Company, stored and held in its said boom in Black Snake about twenty million feet of logs intended to be made up into rafts at said boom and floated into the Mississippi river; that a considerable portion thereof was so rafted and run into the Mississippi river by the way of
14 156 Black river before the placing of the plaintiff's boom across the said river that season, and so continued until prevented from so running said logs out of the Black river, by the placing of said boom across the same; and thereafter, and not before during said year, the logs so rafted at defendant's said boom were run into the Mississippi river by way of French lake.

After the title of the cause, the judgment is as follows to wit:

"This day came the parties, by their counsel, and on reading
14! and filing the certified copy of the judgment and opinion of
157 the Supreme Court of this State in this cause, whereby the judgment heretofore rendered in this action, dissolving the injunction, and dismissing the plaintiff's complaint, and for costs in the sum of eight hundred dollars and seven cents, in favor of said defendants and against said plaintiff, is reversed, and whereby this cause was remanded to this Court, to enter judgment herein, in accordance with said opinion of the Supreme Court, and having heard counsel for the said plaintiff, and counsel for said defendants—

150 158 Now, on motion of Burton & Woodward, plaintiff's attorneys; it is considered, adjudged and decreed, that the said defendants, The La Crosse Booming and Transportation Company, William H. Polleys, William E. Polleys, George Cornes and Benjamin E. Edwards, and each of them, their and each

of their agents, employes and servants, and the officers, agents and servants of the La Crosse Booming and Tranportation Company, be, and they are, and each of them is hereby 159
enjoined and restrained from removing, cutting, destroying, injuring or interfering with the levees, embankments and dykes and other improvements, built, made and maintained by the said plaintiff, over and across lot three (3) in section fifteen (15), and lots six (6) and seven (7), in section twenty-two (22), in township number seventeen (17), in range eight (8), in the county of La Crosse, in said state, and from removing, destroying or in any way interfering with all or any portion of the embankment or dam by which the said plaintiff closed up 160
the slough or branch of Black river, called Black Snake, at the head thereof, and from in any way or manner interfering with or injuring any other of the improvements made and maintained by the said plaintiff, under its said charter, in Black river, within the limits therein specified, or the lakes at or near its mouth; and that they, and each of them, do absolutely desist and refrain from in any way or manner drawing or diverting through the cut or sluiceway mentioned in the complaint in this action, made, created and maintained by them, and situated on the 161
west bank of said Black river, in section twenty-two, in the town and range last aforesaid, and a short distance above the head of said Black Snake branch or slough of said river, any part of the waters of Black river, and from exercising, or attempting to exercise any control over or interfere with said cut or sluiceway, or the dyke or embankment on and along the west side of said Black river above the said head of Black Snake branch or slough, which will draw and divert, or tend to draw and divert, the waters of Black river through the 162
same.

And it is further considered, adjudged and decreed that the said defendants, their, and each of their agents, servants, officers and employes, be, and they are, and each of them is,

hereby enjoined and restrained from digging or excavating any canal, or digging out any slough, pond, bottom lands or land lying or intervening between the main channel of Black river, in La Crosse county, and the Mississippi river, with a view, purpose or intent, of constructing or creating any continuous channel for the purpose of turning or diverting, or which may have the effect to turn or divert, any portion of the waters of said Black river, or of said Black Snake branch, slough or chute, into French slough or French lake, and that the said defendants, and each of them, their, and each of their officers, agents, servants and employes, be, and they are, hereby enjoined and restrained, until the expiration of the said plaintiff's charter, from improving, or attempting to improve, the navigation of Black river, or of the lakes near the mouth of the same, in the counties of Clark, Jackson, Trempealeau and La Crosse as they existed on the 23d day of February, A. D. 1864, by removing obstructions, building dams, breaking jams, deepening, widening or straightening the channel, closing up chutes or side cuts, leading from said Black river into the Mississippi river, or into the bottom lands thereof, or into sloughs; and from constructing levees or dykes on or along the same, and from straightening the banks of said Black river; and from running, driving or passing logs, lumber or other material through the aforesaid cut or sluiceway, and through its or their alleged improvements, down said Black Snake branch, slough, chute or channel, along the west side of French Island into French lake or French slough and the Mississippi river, but they and each of them shall and may be at liberty for their own purposes to maintain sorting and rafting works in the Black river opposite to its or their lands, in such manner that they do and shall not interfere in any way with the works or improvements of the plaintiff, or the proper and reasonable use of the same, and shall, and may be at liberty to excavate in front of its or their lands on Rice lake, for the purpose of aiding in rafting logs, or for any other lawful pur-

pose, which does not and shall not interfere with the works or improvements of the plaintiff, or the proper and reasonable use thereof.

And it is further considered, adjudged and decreed, that the said defendants and each of their officers, agents, servants and employes, be, and they are, hereby enjoined and restrained during the continuance of the charter of the said plaintiff, from exacting or collecting any tolls or charges for any logs, lumber, timber, or other material driven down upon or boomed along the waters of Black river or any of its channels or side-cuts, or upon the lakes near the mouth of the same, within the counties of Clark, Jackson, Trempeleau and La Crosse, as their boundaries existed on the 23d day of February, A. D. 1864, and from in any way or manner diverting logs, timber, lumber, or other materials being floated or driven down said river, and destined for the waters of the Mississippi river from passing to and arriving at the booms of the plaintiff at Onalaska on said Black river near its mouth.

And it is further considered and adjudged, that The Black River Improvement Company, the said plaintiff, recover against the La Crosse Booming and Transportation Company, William H. Polleys, William E. Polleys, George Cornes and Benjamin E. Edwards, the said defendants, the sum of one thousand, eighty-eight dollars and ninety-seven cents, for its costs and disbursements in this action, and that execution issue therefor.

Dated May 24th, A. D. 1882. By the Court,

A. W. NEWMAN,

Judge.

Endorsed. "Filed May 24, 1882.

CHAS. SMITH,

Clerk of Court."

ARGUMENT.

FIRST.

It is respectfully submitted that the writ of error in this cause, if it were otherwise maintainable, was not "brought * * * within two years after the entry of the judgment" in question. U. S. Stat., Secs. 1008, 709.

1. The judgment of the Supreme Court of Wisconsin, "the highest court of the State in which a decision in the suit could be had," was rendered February 7th, 1882, but the cause was not remanded to the court below until the 10th day of May, 1882, by reason of the pendency of a motion for re-hearing, which was overruled on the last named day, when the judgment of the Supreme Court became perfect and absolute. *Railway Company v. Murphy*, 111 U. S., 488. That judgment is certain, definitive and final, and directed a judgment according to the prayer of the complaint, except in one respect. *Ante*, fol. 107. It was at once, if at all, subject to a writ of error; and if, as alleged in the writ of error, there was "drawn in question the construction of statutes of the United States, and the said decision was against the right and privilege set up and claimed by the above named defendants under such statutes of the United States," the judgment of the highest court of the state in which such question could be decided in this suit, was entered within the meaning of the law at that date — May 10th, 1882. But it may be suggested that the judgment was not really entered until the court below acted upon the mandate of the Supreme Court, and obeyed its direction, and that when entered in the court below pursuant to such mandate, it was in law the judgment of the Supreme Court, inasmuch as no choice or discretion was left to that court in respect to what the judgment should be. This will not obviate the objection,

for the court below executed the mandate by signing and entering such judgment, May 24th, 1882, and the judgment for costs was docketed on the 29th of the same month.

The writ is barred if more than two years elapse from the day of the judgment to the day when it is filed in the court which rendered the judgment, and it is not considered as *brought* in the legal meaning of that term, until so filed. *Brooks v. Norris*, 11 How., 204. The writ was not filed until the 28th day of May, 1884, two years and four days after the entry of the judgment in the Circuit Court, and two years and eighteen days after the judgment was complete in the Supreme Court. The objection may be made by motion. *Brooks v. Norris, supra.*

But it may be insisted that the judgment was not *entered* within the meaning of the act of Congress, section 1008, until the costs were taxed and the judgment was docketed, which, it is claimed was May 29, 1884; as has been held in respect to appeals to the Supreme Court of the state under a somewhat similar statute.

Smith v. Hart, 44 Wis., 230.
Andrews v. Welch, 37 Wis., 132–136.

But the answer to this position is, that the ruling of the State Court in this respect is not binding on the United States Court, as to the construction of the United States statute. Nor is it entitled to any persuasive force for the reason that the statute is different, in that the Supreme Court of the United States has jurisdiction of a writ of error to State courts only in a limited class of cases, and the judgment to which such a writ will lie is perfect for all purposes of review under section 709 U. S. statutes as soon as it is signed, without reference to the taxation of costs or docketing of the judgment.

This court has no jurisdiction on a writ of error, as the State Court has, to review a *mere* question of costs. The decision which may be reviewed by this court on writ of error to the

State Court under section 709 U. S. statutes is complete and entered within the meaning of the act when it is announced and recorded. That decision was announced in the Supreme Court of the state February 7th, 1882, and was complete in that court May 10th, 1882, when the motion for rehearing was denied, two years and eighteen days before this writ of error was brought; and it was recorded at length in the Circuit Court, May 24th, 1882, two years and four days before the writ was filed. The writ went to the Circuit Court because the record had been remitted to that court, but the decision to be reviewed is that of the Supreme Court, "the highest court in the State in which a decision in the suit could be had," and the judgment of that court was perfect May 10, 1882, certainly May 24, 1882.

Atherton v. Lawler, 91 U. S., 143, 146–149.
Commissioners v. Lucas, 93 U. S., 108.

It will be noticed that the writ refers to a judgment rendered in the Circuit Court for the county of La Crosse, and as being in "the highest court of law in said State in which a decision could be had in the said suit."

This assertion is utterly without any foundation. The Circuit Court is the court of original jurisdiction, and the Supreme Court of appellate jurisdiction, as will be seen by the record in this case. Wis. R. S., Sec. 3048. The allowance of such a writ was no doubt inadvertent on the part of the Chief Justice of that court, who signed the citation, and the writ should be quashed on the ground that no writ of error lies to review the judgment of the Circuit Court of Wisconsin in such a case as this.

It may be that the writ is amendable so that it may be made to refer to a judgment in this cause in the Supreme Court of the state. That Court has appellate jurisdiction of all judgments rendered in the Circuit Court, and is the highest court in the state in which a decision may be had in any case tried in the Circuit Court; but if amended, the record and writ will

then show that the writ was barred May 10, 1882, eighteen days before it was brought.

SECOND.

The third and fourth objections will be considered together.

1. It is essential to the jurisdiction of this Court that a Federal question was decided in the highest Court of the State, in which a decision in the suit could be had, or that its decision was necessarily involved in the decision of such State Court.

A Federal question must have been *presented* to the State Court; it must have been *necessary* to the determination of the cause, and that it was *actually decided*, or that without deciding it, the judgment as rendered, could not have been given, in order to maintain the jurisdiction.

McManus v. O'Sullivan, 91 U. S., 578.

Brown v. Atwell, 92 U. S., 327, 329, 330.

Citizens Bank v. Board of Liquidation, 98 U. S., 140.

This court will not take jurisdiction to review the action of the State Court, if the Federal question raised here, *was not raised below*, and if no opportunity was given to the State Court to pass upon it.

Edwards v. Elliott, 21 Wall, 557, 558.

Santa Cruz Co. Sup's v. Railroad Company, 111 U. S., 361.

Choteau v. Gibson, id., 200.

The reason for this is apparent. The jurisdiction of this court over such questions is *appellate*, and only for the purpose of review of the decision of the highest court of the state in which a decision thereof in the suit could be had. Besides this is the plain meaning and effect of the act. U. S. Stat., sec. 709. The right to the review of such cases in this court, exists only, 1. "Where is *drawn in question* the validity of a treaty, etc., and the *decision* is against their validity. 2.

Where is *drawn in question* the validity of a statute, etc., of a state on the ground, etc., and the *decision* is in favor of their validity. 3. When any title, right, privilege or immunity *is claimed* under the constitution, treaties or laws of the United States, etc., and the *decision* is against the title, right, privilege or immunity, *specially set up or claimed* by either party under such constitution, treaty, statute, etc."

There is nothing in the record upon which the jurisdiction can be maintained, and we may search the finding of facts, and the opinion of the court below in vain, for anything that shadows forth the existence of any matter of Federal law *drawn in question and decided;* or any title, right, privilege or immunity *claimed* under the constitution, treaties or laws of the United States, *specially set up or claimed* by the plaintiffs in error, and in respect to which the State court *decided adversely.* See *Susquehanna Boom Company v. West Branch Boom Company*, 111 U. S., 57; showing also, that it is not sufficient that the question was raised after judgment and on a motion for rehearing.

The allegation in the writ that in this case there "Was drawn in question the construction of *statutes* of the United States, and the said decision was against the *right and privilege* set up and claimed by the said defendants under *such statutes* of the United States," without showing what *particular* statutes or what *particular* right or privilege was claimed, is entirely too vague and general to support the jurisdiction of the court.

Messenger v. Mason, 10 Wall., 507.

Edward v. Elliott, 21 Wall., 532, 549.

And for the purpose of ascertaining what questions were involved and decided, the court may look at the opinion of the court below.

Murdock v. Memphis, 20 Wall., 633.

McManus v. O'Sullivan, 91 U. S., 579.

Crossley v. New Orleans, 108 U. S., 105.

2. The record, and particularly the opinion of the Supreme Court of Wisconsin, wholly fails to show that any Federal question was involved in this suit, that any such question was presented to the Supreme Court of the State, or was decided by it. It is true, however, that the defendants in their answer set up the provision of the Constitution of Wisconsin, cited below, as securing to them, in whole or in part, the rights they insisted on.

Upon the motion for rehearing in the Supreme Court of Wisconsin, but not at the hearing, it was urged among other things, in substance: 1. That by the clause of the ordinance of 1787, for the government of the Territory of the Northwest, declaring that "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the Confederacy, *without any tax duty or impost therefor*," and Section 12 of the "Act to Establish the Territorial Government of Wisconsin," approved April 20, 1836, extending to Wisconsin Territory the rights and privileges secured by said ordinance, subject to repeal, etc., as therein stated, and Section three of the act of August 6, 1846, to enable Wisconsin to form a state government, by which it is declared that the Mississippi river and "the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor," and the provision of section 1, article 9, of the Constitution of Wisconsin, declaring that "The river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the State as to the citizens of the United States, without any tax, impost or duty therefor," and on the rehearing it was claimed

that the ordinance of 1787 secured to each of the defendants the right to navigate the West Branch or Black Snake, and that any state legislation authorizing the corporation plaintiff to close it, in order to improve the navigation of the Main Branch was void; that as riparian owners on and along said West Branch or Black Snake, they were entitled to have the waters thereof flow by and along their lands as they had formerly done, and that they could not be deprived of such right by the provisions of plaintiff's charter, or proceedings under it, the title to said lands having been derived in the first instance by grant from the United States to their remote grantors.

If these claims, and I am not aware of any others, raised any Federal question, they came entirely too late, having been urged for the first time, on the motion for rehearing.

Susquehanna Boom Co. v. West Branch Boom Co.,
111 U. S., 57.

A. As to the claim founded on the ordinance of 1787, and the provisions of the act for the formation of the Territorial government, and the act to enable Wisconsin to form a state constitution and be admitted into the Union, it is only necessary to refer to the fact that by the act of Congress of May 29, 1848, the state of Wisconsin was "admitted into the Union on an equal footing with the original states, *in all respects whatever*," and for more than a quarter of a century it has been held as settled law that, upon the admission of a new state into the Union on an equal footing with the original states, this provision of the ordinance of 1787, and all similar congressional provisions become *functus officio* as to such state.

Black river is a stream entirely within the limits of the state of Wisconsin, entering the Mississippi on the east side at La Crosse, and Wisconsin, after admission, could exercise the same power over rivers within her limits that Delaware exercised over Black Bird creek, and Pennsylvania over the

Schuylkill river, so far as any provision of Federal law is concerned.

Wilson v. Blackbird Creek Co., 2 Pet., 245.
Gilman v. Philadephia, 3 Wall., 713.

A notable case on this point and quite like this one is *Buckley v. Withers*, 20 How., 84, 91–94. And in Mississippi, where the case of *Buckley v. Withers* arose, the provisions in relation to the Mississippi river and its tributaries to the same effect as in the ordinance of 1787, and said Congressional enactments as to Wisconsin, were carried into the Constitution of that State, as in the case of the Contitution of Wisconsin, article 9, section 1, *supra*. See Poor's Constitutions; part 2, page 1066, title „Ordinance."

Authorities to this effect are very numerous:

Pollard v. Hagan, 3 How.. 212.
Permoli v. First Municipality id., 589.
Strader v. Graham, 10 How., 82.

The whole subject has been quite recently considered in the case of *Escanaba Co. v. Chicago*, 107 U. S., 678, 688–691, and this case leaves nothing to be added.

The obligation of Section 1, Article 9, of the Constitution of Wisconsin is self imposed. and is not of Federal origin, in any just sense of the word.

The question whether the legislation in question, is in conformity with the constitution of Wisconsin, is not open for consideration on this writ:

Buckley v. Withers, 20 How., 84.

That the State of Wisconsin, through its legislature had full power over Black River, to regulate navigation on it, to provide for improving it, the building of booms, piers, etc., in the

absence of any conflicting legislation by Congress is well established in many cases and notably in *Pound v. Turck*, 95 U S., 459.

Gilman v. Philadelphia, 3 Wall, 713.
Escanaba Co v. Chicago, 107 U. S., 683–688.
Wisconsin Imp. Co. v. Manson, 43 Wis., 255.

The corporation plaintiff is a *quasi* public corporation acting under the undoubted authority of the state to improve the navigation of the river:

Cohn v. Wausau Boom Co., 47 Wis., 325.

B. As to the claim of invasion or deprivation of riparian rights, it respectfully submitted that the case involves no question of Federal law and that it was rightly decided in the Supreme Court of the State. The law which governs this aspect of the case, is the common law (*Barney v. Keokuk*, 94 U. S., 321), and in respect to which the judgment of the State Court is not subject to revision.

It cannot be maintained that the judgment of the highest court of a state is open to review in this court, because the subject-matter of the litigation is the title to land, or a trespass thereon, or injury thereto, which title was remotely derived from the United States.

The question of riparian rights, like that of boundary, is not a question of Federal law, so as to give this court jurisdiction. The parties must abide by the determination of the State tribunals.

McDonough v. Millaudon, 3 How., 693.
Kennedy v. Hunt, 7 How., 586.
Moreland v. Page, 20 How., 522.
Lanfear v. Hunley, 4 Wall., 204.
Carpenter v. Williams, 9 Wall., 785.

The question as to the power of the legislature of Wisconsin over navigable streams and in respect to rights of riparian

owners thereon, was solely for the Supreme Court of Wisconsin to decide and its determiation as to the powers of the legislature of Wisconsin is final; no provision of Federal law having been infringed.

THIRD.

The authorities cited under the second division of this argument sustain the point that if any questions of Federal law were involved in this cause, they were correctly determined, and this is so entirely plain that, if the writ of error is not dismissed, the judgment of the court below should be affirmed, on the ground that it must be considered as taken for delay only.

An earnest desire to terminate this protracted litigation, affecting interests of great magnitude, is the reason for presenting these questions at this time, instead of waiting until the cause can be reached on the regular call, and the statement is more elaborate than may seem to be necessary, but the intention is to make it entirely fair.

S. U. PINNEY,
Counsel for Defendant.